UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

IN RE: THE FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, et al., Debtors.	PROMESA TITLE III No. 17 BK 3283 (LTS) (Jointly Administered)
UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO (UTIER), Plaintiff, v. PUERTO RICO ELECTRIC POWER AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO; JOSÉ B. CARRIÓN III; ANDREW G. BIGGS; CARLOS M. GARCÍA; ARTHUR J. GONZÁLEZ; JOSÉ R. GONZÁLEZ; ANA J. MATOSANTOS; DAVID A. SKEEL, JR. and JOHN DOES 1-7, Defendants.	Adv. Proc. No. 17-228 (LTS) Filed in Case No. 17 BK 4780 (LTS)

Motion Hearing
January 10, 2018
10:00 a.m.

Before:

HON. LAURA TAYLOR SWAIN,

District Judge

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(Case called)

THE COURT: Again, good morning and welcome to counsel parties in interest members of the public, and members of the press, those in San Juan, and those who are observing by telephone.

We have the privilege this morning of being joined by the clerk of the district court of the District of Puerto Rico, Frances Moran, as representative of that court as well as the assistant operations manager for the district court, Gretchen Rodriguez. As always, our thoughts are with those who are living in Puerto Rico.

I remind you that consistent with court and judicial conference policies and the orders that have been issued, there is to be no use of any electronic devices in the courtroom to communicate with any person, source, or outside repository of information, nor to record any part of the proceedings.

Thus, all electronic devices must be turned off unless you are using a particular device to take notes or to refer to notes or documents that are already loaded on the device. All audible signals, including vibration features, must be turned off.

As provided in the Court's standing order, no recording or retransmission of the hearing is permitted by any person, including, but not limited to, the parties or the press.

Anyone who is observed or otherwise found to have been texting, emailing, or otherwise communicating with a device during the court proceeding will be subject to sanctions, including, but not limited to, confiscation of the device and denial of future requests to bring devices into the courtroom.

So this morning's agenda is oral argument in connection with Aurelius' motion to dismiss the Commonwealth's Title III petition, which is case 17 3283; Aurelius' motion for relief from the automatic stay which was also filed in the Commonwealth case, 17 3283; and defendant's motion to dismiss the UTIER v. PREPA adversary proceeding, which is adversary 228 in the PREPA Title III case, which is 17 4780.

I'd like to express my gratitude to counsel for having organized their argument time, both in terms of allocation and in conceptual division. That should make everything go smoothly.

Before we begin with arguments, I want to remind counsel to speak from the podium and speak directly into the microphone at all times so that you can be heard clearly, not only here in the courtroom but also in the remote observation facilities and by those who are listening on the telephone.

So, with that, I would invite Mr. Olson to the podium. Good morning.

MR. OLSON: Good morning, your Honor. May it please the Court. Thank you, Judge Swain.

My colleague will address the stay issue. I think that allocation of time was already mentioned to your Honor.

THE COURT: Yes. We have you for 30 minutes.

MR. OLSON: Yes. Thank you, your Honor.

The issue before the Court today is exceedingly important and its resolution cannot be abated or postponed. Indeed, the earlier this issue, which has to do with the constitutionality of the Oversight Board, the earlier that that is resolved, the better for everyone concerned.

The Constitution's separation of powers of which the appointments clause is a fundamental structural component is a central and vital part of our Constitution and whose ultimate purpose the Supreme Court has repeatedly held is to protect liberty and security of the government.

That clause, which is found in Article 2, Section 2, Clause 2 of the Constitution provides for the appointment of all officers of the United States. The members of PROMESA's oversight Board are officers of the United States and not appointed in the manner required by Article 2. Their appointments are, therefore, void.

I will enumerate some of the provisions that apply to the powers and authority of the Oversight Board in order to articulate the fact that they are officers of the United States.

THE COURT: Before you go to that particular point of

proof of officer of the United States status, I would like to ask you to address another threshold issue, which is that here, as everyone acknowledges, Congress purported to create the Board as a territorial entity.

So, in your view, does Congress have the power under Article 4 to create positions that are positions within territorial entities at all? If so, does the appointments clause always apply to those positions simply because they're created by Congress?

MR. OLSON: I will address this at this point and also amplify it a little bit later in my presentation.

The United States Supreme Court in a recent decision of the Metropolitan Washington Airports Authority case directly addressed the issue of the application of the appointments clause of the Constitution to territories of the United States and with respect to Congress' power under Article 4 to legislate rules and regulations governing the territories of the United States.

And the Supreme Court in the Metropolitan Washington Airports Authority case squarely rejected the proposition that was being urged by the parties that the Airports Authority, which was property of the United States and, therefore, covered by Article 4, did not mean that the appointments clause did not apply in that case.

Similarly, in other situations, the Supreme Court has

held with respect to other provisions of the Constitution, which purport to provide plenary authority to Congress to legislate rules and regulations, the court has held that the exercise of those authorities are still, nonetheless, subject to the appointments clause, which, as I said, is an important structural component of the United States Constitution so that what happens with respect to the territories, yes, Congress has what is said to be plenary authority there.

It is said to have plenary authority in the Constitution under Article 1 with respect to the District of Columbia. It is said to have plenary authority in other contexts as well.

In the provision in the Buckley case, which had to do with the Federal Elections Commission, the argument was made there that the appointments clause did not apply to the creation of the Federal Elections Commission because Congress had plenary authority with respect to the regulation of elections.

And the Supreme Court flatly and squarely rejected the argument there and specifically said Congress cannot decide for itself the rules and regulations with respect to the application of fundamental provisions of the Constitution.

Congress can, if it wishes, create certain authorities or official positions in territories or allow positions in territories to be created by the territories themselves, under

for example, with respect to Puerto Rico, the governor of Puerto Rico under the Constitution of Puerto Rico.

But here the fundamental test by the United States Supreme Court is does the officer exercise significant authority under the statutes of the United States. If so, that person is an officer of the United States.

There is no territorial exception in the appointments clause itself, and there is no provision in the territorial language of Article 4 that excludes the presentment clause, the powers of vetoes of the president, other separation of powers issues which the Supreme Court specifically says are fundamental to our individual liberties and the structure of our government.

The appointments under PROMESA involve the creation of principal officers of the United States because they do unquestionably, I would submit, exercise significant authority pursuant to the laws of the United States.

This articulation of the standard, significant authority under the statutes of the United States, appears in many cases, including the Freytag case and the other cases which we've cited in our brief. And I will enumerate some of those provisions that make it clear, beyond any doubt I would submit, that these individuals exercised significant authority under the laws of the United States.

They were created -- the Board was created -- by a

federal statute. Its only function is to enforce federal law, PROMESA. Its members were appointed by a federal official, the President. Its members are supervised by and removable by a federal official, the President of the United States. Its members were presumably commissioned as federal officers.

I would suspect that each of the members of the Board have in their offices someplace a commission which is required under the Constitution with respect to officers of the United States, and if they don't have such a commission, then that's an additional problem for those individuals, and maybe we will hear whether they do or not.

The President, under Article 2, Section 3, shall commission all officers of the United States. Its members of the Oversight Board are subject to federal ethics laws. Its responsibility is to deal with the massive financial crisis affecting millions of United States citizens, both within and without the territory of Puerto Rico.

The Board has the power to approve Puerto Rican government contracts, the issuance of Puerto Rican debt, and to nullify Puerto Rican laws inconsistent with its responsibilities. It enforces public rights, which is another aspect of its responsibility that is very important.

Under the Buckley decision, the court was talking about the Federal Election Commission, and it says it has primary responsibility for conducting civil litigation in the

courts of the United States. Here the Board has the responsibility exclusively to enforce the provisions of PROMESA which, as the Buckley court said, is a hallmark of officers of the United States.

It can administer oaths, hold hearings, take testimony, receive evidence, and issue and enforce subpoenas -- all powers of officers of the United States.

The Board wields more power than the Board of review that existed under the Metropolitan Washington Airports Authority case. That case, as you know, discussed a board of review for that agency which had responsibility to oversee the management of two airports in the vicinity of Washington D.C. Its powers were somewhat great but somewhat limited compared to the powers of the PROMESA Oversight Board.

THE COURT: Mr. Olson, MWA wasn't a core element of the Court's objection to that board. Its practical function as an agency of Congress and its overstepping of the separation of powers boundaries in putting members of Congress into an executive oversight position -- quite honestly, I haven't memorized all of the cases, but it's my recollection that that was the main focus as opposed to officer of the United States and appointments clause, but I could be completely wrong about that.

MR. OLSON: Well, the fundamental question was the application of the separation of powers and the appointments

clause. The violation in that case was that the Oversight Board was designated to consist of members of Congress themselves, which would have been a separate and independent violation of the appointments clause, and indeed the court found that to be unconstitutional.

The statute there specifically said, well, if these members who are going to be members of Congress who function in their individual capacity -- and that's an important aspect of the case. Congress tried to avoid the appointments clause, the Article 2 appointments clause problem, by saying that they're functioning in their individual capacity, which would have maybe solved the problem of the incompatibility clause which precludes members of Congress from being an officer of the United States.

But the fundamental issue was indeed, does the appointments clause and the separation of powers of, which the appointments clause is such an important provision, apply to the property of the United States, the property of the United States. "Territory" or "property" of the United States are interchangeable terms.

So the court squarely held that that defense, that because it was a property or territory of the United States the appointment clause provisions did not apply -- the court squarely rejected that.

As I said, that is not the only case where the court

has rejected issues such as that. We have examples of territorial courts. We have clerks of territorial courts who are officers of the United States.

So, in all of the cases -- and we've traced it all the way back to Marbury v. Madison. Marbury was appointed to be a justice of the peace for the District of Columbia, a property of the United States, and the United States Supreme Court in the famous Marbury v. Madison case, which involved judicial review, explicitly held that that was an officer of the United States.

The whole fight there, aside from the judicial review issue, involved the question of whether he had to have delivered to him the commission issued by the President. The court held that he didn't have to, but the point was he was an officer of the United States, notwithstanding he was the justice of the peace of the District of Columbia.

I will add that the court in the Metropolitan Washington Airports case talked about the exercise of significant power in violation of the separation of powers principles, and those are the same things that we're talking about here.

Furthermore, in addition to all of the other things that I've said, which seems cumulatively overwhelming evidence that these individuals are officers of the United States, the Board is a federal entity under the test established in Lebron

v. The National Railroad Passenger Corp. because it is established -- and I'm using the words of the court in that decision -- established and organized under federal law, pursues federal government objectives, and Congress may repeal, alter, or amend its powers at any time, and its members are directly appointed by the President. All is true in that case making that a federal agency, and the same is true here.

PROMESA's language that the Board is a part of the territorial government -- and you may have been referring to that earlier because the statute itself says this is a Board created under the territorial government -- carries little weight because even when Congress acts under Article 4, under that Metropolitan Washington Airports case, separation of power analysis, the court said, does not turn on the labeling of an activity. The activity itself is what is important. Where the authority comes from, federal statute; is it the execution of significant authority under federal law. Those are the tests, not whatever label Congress decides to put on it.

The Board members are principal officers because only the President can supervise them. They're answerable to no other officer of the United States, not to a subordinate officer of the United States.

That test has been repeatedly articulated most recently in the Free Enterprise Fund case. So the test of whether an individual who is an officer of the United States is

a principal officer of the United States, requiring advice and consent and approval from the senate, is whether one -- and I'm quoting the Free Enterprise Fund case -- "whether one is an inferior officer depends upon whether his work is directed and supervised at some level by principal officers."

These individuals in this Board are not supervised by any other officer of the United States. Only the President has the power to remove and to supervise them. In the case, ^Vagner v. Sign Art case, the Supreme Court said it is the power of removal. Where that power lies is what the official must obey, fear, and, therefore, obey. That is the test, the removal power. The only authority here is the President of the United States.

Even if they were inferior officers, if they are principal officers, their appointments manifestly did not comply with the appointments clause because their positions weren't subject to advice and consent by the United States senate.

If they're inferior officers, the appointments clause still provides that the provisions for their appointment does not comply with the appointments clause because the Congress gave very little opportunity for the President to control who would be appointed.

Between the time when the statute was passed and the time when the President had to act was just a matter of a

couple of months, most of which time the senate was not in session.

So there were only eight days when the senate was in session during which appointments could be submitted to the senate for advice and consent. There were only eight days there. There was no time for the President.

If the President didn't act subject to using the advice and consent provisions within that period of time, once that window closed, the President must appoint from the list submitted by Congress.

And Congress was very clear about this. The legislative history, which we've quoted in the briefs and I'm sure you've read, is that -- this is the words of the committee report -- "PROMESA's purpose was to ensure that a majority of the Board's members were effectively chosen by republican congressional leaders," not by the President of the United States but by republican congressional leaders.

So, even if they were inferior officers -- and they most manifestly are not inferior officers -- those provisions, the way it was set up, was designed to ensure that Congress would make the appointments. The President had to choose from the list, and Congress cannot put the President of the United States in that kind of a box.

In a sense, in a very real sense, the United States has conceded this point. If you look at their brief at page

34, the brief of the United States, note 15, the United States says that PROMESA's provisions for future appointees in case of vacancies can essentially be ignored. The President can go ahead and make these appointments with the advice and consent of the senate, despite what the provision says.

What the United States says at that point is to avoid serious constitutional problems. There wouldn't be any serious constitutional problems if the appointments clause did not apply to these individuals as officers of the United States.

So, in a sense, the United States has said, well, don't worry about that because in the future, we'll just ignore those provisions in order to construe the statute as ignoring those provisions and avoid the serious constitutional questions.

I think it comes back to the question that you raised at the very beginning about the territories and the persons that hold authority in territorial jurisdictions. The source of the official's power determines whether he's an officer of the United States.

With respect to the governor of Puerto Rico as it currently establishes, the source of that individual's power is the Constitution and the statutes and the citizens of Puerto Rico.

The source of the authority of PROMESA Board members is PROMESA itself. It's a federal statute.

THE COURT: So do you read Sanchez Valle's analysis of the fundamental origin of governmental power in Puerto Rico as driving from Congress as limited to the formulation of criminal laws and prosecution of criminal laws?

MR. OLSON: That case, which --

THE COURT: Puerto Rico against Sanchez, the double jeopardy case. My question is that you were indicating that the authority of the governor of Puerto Rico, now popular election, stems from the people of Puerto Rico.

In the double jeopardy case in Sanchez Valle, the court looked past the congressional grant of authority to Puerto Rico to establish a Constitution to ultimately hold, as I read it, that the power to make and prosecute criminal law goes back to Congress so that both the federal law and the local Puerto Rico law derived from the same sovereign, and that drove the resolution of the double jeopardy question.

So do you read that case as only applying in that criminal law context? If not, how do you square that with the motion that the governor's position and authority derived from the people rather than ultimately from the Congress that permitted the adoption of the Constitution and also passed the earlier laws permitting popular elections?

MR. OLSON: We would submit that it's clear from the context, the double jeopardy context, and the language of course of the decision itself was focused on the fact of

separate sovereigns.

And the court determined that Puerto Rican territory was not a separate sovereign as a state would be because ultimately the authority of its existence and its Constitution and so forth ultimately came from the United States, the Constitution of the United States.

That's peculiar to separate sovereign issues for the same reason the 10th Amendment wouldn't apply and certain other clauses that are pertinent to the states as separate sovereigns wouldn't apply.

Here the test is do the officials exercise authority, immediate authority; what is their source of immediate authority; to whom are they accountable. From the beginning of our history, the courts have acknowledged in fact that there may be territories, and that those officers in those territories, including even clerks of Article 1 courts, are officers of the United States in territories. That's another authority for what we're arguing to you today.

Also Congress can permit in the territories a Constitution or bylaws or organizations pursuant to which local officials are responsible to that local authority and to the people there. They're accountable. That's the source of their immediate authority. So that's the big difference between that case and the case that we're talking about.

These Board members are not accountable to anyone in

Puerto Rico. They are accountable to the President. By contrast in connection with your point, the Puerto Rican governor is accountable to the island's electorate.

These are the words of the United States Supreme Court: "Congress cannot create a board whose officers enforce only federal law and are appointed, overseen, and removable only by the President yet label that board a territorial entity and require the President to select its members from lists created by individual members of Congress."

The Free Enterprise Fund case is an interesting example because the language of the Supreme Court there said this is so novel and so unusual, it comes with a heavy presumption of maybe violating the Constitution.

As Chief Justice Marshall explained three years after Marbury v. Madison in connection with a D.C. justice of the peace appointment by the federal government, the court said -- this is the language of Justice Marshall -- "He must be an officer under the government of the United States driving all of his authority from the legislature and President of the United States. He is certainly not the officer of any other government." That goes back to 1806.

As the Supreme Court stated in the Freytag case, since the early 1800's, Congress regularly granted non Article III territorial courts the authority to appoint their own clerks of court who, as of at least 1838, were inferior officers of the

United States within the meaning of the appointments clause. That is the language of the Freytag court.

Now, if clerks of territorial courts are officers of the United States within the meaning of the appointments clause, so then must other officials whose officers are created by federal statute, are appointed by a federal official, and serve even in territories.

So it is quite clear that there is no intended exception or no acceptable exception to the separation of powers constraints which could not be more fundamental.

Every time the Supreme Court talks about an appointments clause -- you can see this language in Buckley. You can see it in other cases -- the court talks about how fundamental these separation of powers and the appointments clause in particular is to the structure of our government.

That is a basic fundamental principle, and that was something that was thought out and discussed at great length at the constitutional convention, how people will be appointed.

In one of the cases, the court talks about that was a great concern. Abuse of the appointment authority by the executive at the time of the revolution and the creation of the new government was something that was exceedingly important.

So, when Congress wrote that provision into Article 2 of the Constitution, it was something that was exceedingly important to the structure and the separation of powers because

the structure and the separation of powers and the confinement of the appointment authority was fundamental to liberty and the security of our government.

The appointments clause and the separation of powers invariably apply and govern all officers of the United States. Congress is not immune from scrutiny of constitutional defects just because it invokes Article 4.

No case has ever held that those provisions of the Constitution do not apply to the territories, and numerous other constitutional provisions that are part of the structure of our Constitution apply in the territories.

Now, I will say one more thing before stopping and reserving the balance of my time for rebuttal. I think all the parties agree that whatever decision is made by you, this Court, with respect to this issue, A, it's very important that this issue get resolved as quickly as possible. I think everyone would agree with that.

There is a lot of uncertainty which even Congress recognized. One member of the United States senate said, you know there's going to be a challenge in court to this structure of the Constitution. Let's not do it this way. But Congress went ahead and did it this way anyway.

As long as this cloud, which we regard as a very, very serious cloud, hangs over the authority of this Board, every decision that it makes may potentially be void. If a decision

is finally made six months from now or even six weeks from now, that's less good, in terms of the ultimate benefit of everyone concerned, than to have it resolved.

Hopefully Congress will go back and do it right. It can be done quickly. The appointments clause can be factored in. Those provisions can be severed, and Congress can rewrite it.

The President can make new appointments, and the effect of your decision -- you can stay your decision. The Supreme Court did that in the Northern Pipeline case. It did it in other contexts with respect to separation of powers challenges. The effects of the decision can be stayed to avoid all of the dislocation and parade-of-horribles that we've been hearing about in the briefs that oppose our position.

So, while it's important that it be decided soon so that the problem can be corrected -- and it can be corrected relatively easily. It's not going to be difficult to do -- it is important that it be done soon, and the effect of that decision can be stayed while the problem is fixed.

THE COURT: Thank you, Mr. Olson.

Mr. Emmanuellei.

MR. EMMANUELLEI: Good morning, your Honor.

THE COURT: Good morning. We have you down for 20 minutes.

MR. EMMANUELLEI: Yes. May it please the Court.

The central issue in this case is if the members of the Financial Oversight and Management Board of Puerto Rico are federal officers or not. Any discussion regarding the power of Congress over Article 4 could be material if this Court finds that the Board members are federal officers, meaning that they exercise significant federal authority according to Buckley v. Valeo.

On the other hand, if this Court finds that the condemn insular cases are the foundation for this Court to rule that the appointments clause is not applicable to the territories, in such instance, UTIER argues that the insular cases should be overturned.

These cases stand at par with Plessy v. Ferguson in permitting disparate treatment by the government of a discrete group of citizens solely based on race. In the words of Honorable Judge Juan Torruella of the First Circuit, the redeeming difference is that Plessy is longer the law of the land, while the Supreme Court remains aloof about the repercussions of its action in deciding the insular cases as it did, including the fact that these cases are responsible for the establishment of a regime of de facto political apartheid which continues in full vigor.

THE COURT: I'm sorry. If I were to determine that I should make an argument recommending that at the end of the day when this gets to the Supreme Court the Supreme Court should

repudiate the insular cases, what do you see as the practical result or a default position in the absence of the insular cases?

Would all territories automatically have all of the status, rights, privileges and be subject to all provisions of the Constitution just like states? Or is there some other set of principles that would apply to congressional action under Article 4 with respect to the territories?

MR. EMMANUELLEI: We believe that there is an issue for Congress to address because there are some scholars that argue that Puerto Rico will become an incorporated territory. So we would have access to all the rights and protections of the U.S. Constitution, your Honor.

THE COURT: Thank you.

That's not something that the Court could declare. Congress would have to go back.

MR. EMMANUELLEI: Yes, your Honor. I believe so.

It is not necessary to address that issue if this Court decided that the federal officers of the Board are subject to the appointments clause, your Honor.

Justice Torruella also stated that the insular cases were wrongly decided because, at the time of the ruling, they squarely contradicted longstanding constitutional precedent. Their skewed outcome was strongly influenced by racially motivated biases and by colonial governance theories that were

contrary to American territorial practice and experience.

The reliance of the opposing parties in the insular cases and the doctrine of discriminatory incorporation of fundamental constitutional rights accolade that Puerto Rico continues to be a colony inhabited by 3.4 million second-class American citizens who do not have political or economic rights as do the resident citizens of the other states.

The opposing parties seek to radically outspread the insular cases to further deprive Puerto Rico's citizens of not only the Bill of Rights' individual protections but also of the Constitution's structural protections.

None of the insular cases involved the appointments clause or any other structural constitutional provision or principle. And even if the insular cases had comprehended certain structural provisions of the new colonial regime, these cases also recognize restrictions of so fundamental a nature that they cannot be transgressed. Thus they apply to the territories.

Certainly the appointments clause is among the significant structural safeguards of the constitutional scheme. But if in any way the insular cases preclude this challenge, UTIER affirmatively argues that the insular cases should be overturned.

In their motions to dismiss, some of the opposing parties stated that UTIER lacks constitutional and prudential

standing upon the incorrect premise that the complaint never explains how the actions of the Board adversely affected its members' collective bargaining agreement.

On the other hand, regarding prudential standing, the Board stated that UTIER and its members lack prudential standing to complain about the certifications, because PROMESA Section 106(e) deprived the district courts of subject matter jurisdiction to hear the challenges to the fiscal plan certifications.

These allegations are a gross mischaracterization of the facts alleged by UTIER in the first amended adversary complaint at docket 75. As stated in paragraph 29, UTIER, as PREPA's primary workers' union representing 3,600 workers, is a creditor in this case, and figures as such, in the creditor matrix of this Title III case.

The result of thousands of pending judicial and administrative proceedings and the recovery of unappealable judgments, in actions brought by UTIER against PREPA, are at stake in the Title III case. Thus UTIER has a large pecuniary interest in the outcome of this case.

Moreover, UTIER, as a creditor, has a right to question the validity of the filing of this Title III petition under Section 930 of the bankruptcy code and Section 304 of PROMESA.

UTIER has standing to fight this adversary proceeding,

as creditor and party in interest, according to Section 301 of PROMESA which incorporates Section 1109 of the bankruptcy code.

UTIER negotiates and enforces the collective bargaining agreement which is currently valid and binding and which governs the terms and conditions of employment of its members.

Its members suffered an invasion of a legally protected interests such as employment, salaries, bonuses, pensions, and health plans, that is concrete and particularized, actual or imminent, not conjectural or hypothetical, and fairly traceable to the challenged conduct of defendants and likely to be redressed by a favorable judicial decision.

That Board alleges that section 1109(b) of the code does not automatically satisfy the zone of interest test required to demonstrate standing. But the Board omits that the First Circuit decided that Article III standing is almost always satisfied with respect to any party in interest in a Chapter 11 case.

With regard to standing, the amended complaint is sufficient to satisfy the legal standards required by the Supreme Court in Bell Atlantic Corp. v. Twombly, and Ashcroft v. Iqbal.

In paragraphs 11 through 29 of the amended complaint, UTIER alleges with detail that the actions of the unlawfully

appointed Oversight Board members have substantially impaired the collective bargaining agreement, entered upon by PREPA and UTIER on behalf of its members; 37 out of 50 clauses were impaired by certain statutes enacted by the government.

Those laws substantially affected the entitlements and fiduciary duties of UTIER to negotiate and defend the collective bargaining agreement that protects its members. These laws were adopted by the members of the Board in the Commonwealth's fiscal plan and in PREPA's fiscal plan and budget, while being improperly appointed as members of the Oversight Board.

Constitutional standing requires a showing of an injury in fact that is concrete, distinct, and palpable, and actual and imminent. Any monetary loss suffered by the plaintiff dissatisfies this element. Even a small financial loss suffices. An allegation of future injury is sufficient, so long as the threatened injury is certainly impending or there is a substantial risk that the harm will occur.

The Board claims that neither the fiscal plans nor the budgets discharges any claims and that no motion to that effect has been filed, but it also asserts that the fiscal plan is an operative blueprint for financial management and the plan of adjustment of debt.

However, a collective bargaining agreement is an executory contract within the meaning of Section 365(a) of the

bankruptcy code and is, therefore, subject to rejection by the debtor, at any moment, under appropriate circumstances.

Also the filing of a plan of adjustment is the sole purpose of this Title III petition. Eventually, the Board will fight the plan of adjustment and will further impair the rights of UTIER, which at the very least, represents an imminent injury and a monetary loss for its members.

In terms of prudential standing, UTIER authorized to sue on behalf of its members since it is its exclusive representative regarding their labor rights under the collective bargaining agreement. UTIER's members, as employees of PREPA, are creditors with pecuniary interest in the outcome of this Title III case and have standing to sue in their own right.

This is so, particularly because their accrued fringe benefit, salaries, vested rights, and pension benefits are at stake in this Title III case. Therefore, their interests are germane to UTIER's purpose. In addition, neither the claim asserted by UTIER in this adversary proceeding, nor the relief requested, requires the participation of the members in this lawsuit.

With regard to prudential standing, Lexmark International, Inc. v. Static Control Components, Inc., questioned the continued validity of prudential concerns as grounds for dismissal.

MR. ROLANDO: First, the court concluded that the zone of interest's test concerns whether congress has authorized a plaintiff to sue. Second, the court held that its limitations on generalized grievances suits are based on constitutional Article III standing requirements and not the prudential standing principles relied in some of the court's previous decisions.

In Lexmark, even Justice Antonin Scalia, writing for a unanimous court, partially abolished the prudential standing doctrine when he expressed that a court cannot limit a cause of action merely because prudence dictates.

Section 106(e) of PROMESA appears to deprive this court of jurisdiction to review challenges to the Oversight Board certifications. However, Section 106(a) of PROMESA clearly created a jurisdictional basis for this court to entertain against the Oversight Board. The apparent contradictory language between both provisions of the act oblige this court to entertain the matter and construe the law according to the U.S. Constitution.

Plaintiff is neither asking this court to reverse or enjoin the certification process. Rather, its aim is for this court to prevent illegally appointed board members from pursuing this and any Title III cases, or the exercise of any other power or authority provided by PROMESA, until they are recast to comply with the appointments clause of the U.S.

Constitution. Thus, there is no doubt that the Oversight Board's actions are susceptible of court review.

For the reasons already stated, UTIER has constitutional and prudential standing to bring this action.

But moving on to the discussion of the appointments clause, we hereby adopt the arguments already stated by Aurelius in their oral argument on their briefs.

The U.S. Government states that: Crucial to the solution of this controversy is the fact that the Oversight Board does not exercise federal authority. On the other hand, the opposing parties defend inapplicability of the appointments clause claiming that the board members' authority is rather limited, since they clearly exercise authority only within the territory of Puerto Rico. Not so.

Under Article IV, congress can govern the territories with few restrictions, but this broad power ceases when it creates a federal office. None of the opposing parties have argued that the appointments clause does not apply to a federal officer. A person is a federal officer when he or she complies with the constitutional definition, regardless if the office is created for a state or a territory. What the opposing parties are arguing is that the board's members are not federal officers, but territorial. Therefore, our analysis should be the applicability of Buckley v. Valeo to the members of the board.

In Buckley, the Supreme Court stated that an officer of the United States is every official whose position is established by law and who exercises significant authority pursuant to the laws of the United States. Only those public officials who are properly characterized as mere employees fall outside the appointments clause's scope.

This case, just a simple analysis of the board's task and powers, as mandated by PROMESA, lead to the conclusion that they, in fact, exercise significant authority under federal sovereignty. The fatal loophole in the opposing parties' argument regarding the alleged nature of the board as territorial is that, among the other powers, the board exercises the exclusive federal power of pursuing the territory's adjustment of debt. Particularly, of debt owed to bondholders in the mainland, such as Aurelius. That is irrefutable evidence of the significant federal authority that the board members are exercising under PROMESA.

As we mentioned at page ten of our reply in opposition to the statement of the United States, PROMESA allows the board to file on behalf of its territory for the protection of Title III, and to be able to submit a plan of adjustment of debt; thus, impairing the obligations to bondholders, hedge funds, insurers, and other creditors that are based and do business globally.

Adjustment of debt is an exclusive federal power

according to Article I, Section 8, Clause 4 of the Constitution. See Puerto Rico v. Franklin California Tax-Free Trust, holding that the preemption provision of Section 903(1) of the bankruptcy code bars states and their territories from enacting municipal bankruptcy laws. Thus, bankruptcy is strictly federal because the Constitution empowers congress to establish uniform laws on the subject of bankruptcies throughout the United States.

THE COURT: In jurisdictions that are subject to the bankruptcy code where there is no special PROMESA and there is no Oversight Board so that the municipality, with the permission of the state, can propose a plan of adjustment or in a chapter 11, say, where the debtor in possession or the creditor proposes a plan of adjustment, is that the exercise of an exclusively federal power by that debtor?

If not, why does it make a difference that here it is the Oversight Board that makes that filing, makes that structural proposal, as opposed to the municipal entity or the private entity?

MR. ROLANDO: The bankruptcy code allows the debtor to file a chapter 9 case if it is authorized by the state to do so. Here, congress approved a law, enacted a law, authorizing just the board to file for the protection of Title III. So they are vesting the board with the power of Article I of the bankruptcy clause to pursue a plan of adjustment in a territory

or in another state, if the congress authorizes that. So it is not the same.

The bankruptcy law authorizes a municipality to pursue a Title III case, but here, they are creating this entity with the specific power vested from congress to pursue a case, even though in a territory, that will affect all creditors notwithstanding the fact that they live in Puerto Rico or they live outside. Therefore, the only power that sustained that authority is the power of the Constitution to establish bankruptcy laws.

THE COURT: Thank you.

MR. ROLANDO: Bankruptcy is strictly federal because the Constitution empowers congress to establish uniform laws on the subject of bankruptcies throughout the United States. Although state law continued to govern most debtor-creditor relations, congress has the authority to overwrite state laws dealing with insolvency.

In fact, in 2006, the Supreme Court surprised many by holding that the bankruptcy clause overrode state sovereign immunity, at least with respect to matters ancillary to the central jurisdiction of the bankruptcy court, over the debtor's estate. Obviously, when congress can affect the prerogatives of the states, it is not exercising a territorial power under Article IV.

There should be no doubt that PROMESA is imposing

exclusive bankruptcy federal power of Article I of the Constitution under the provisions of the federal rules of bankruptcy procedure. Thus, the members of the board are exercising significant federal authority. If PROMESA is a laser focused Article IV territorial statute, as the opposing parties claim, how could it impair in any way the rights of creditors of the municipal market of the United States without enforcing the exclusive federal power under the bankruptcy clause of the Constitution?

THE COURT: Thank you.

Your time expired, and so if you want to sum up very briefly, you may, or if you're done.

MR. ROMANELLO: I'm done.

THE COURT: Thank you so much. Next we'll hear from Mr. McGill for five minutes.

MR. MCGILL: Thank you, your Honor.

I am hear to address Aurelius' motion concerning the automatic stay, and I'll be very brief.

Aurelius filed this motion simply to ensure that it could obtain promptly all of the injunctive relief that it is entitled to if we are to prevail on our appointments clause challenge. This court has held that it lacks jurisdiction over a claim that does not arise under or is not related to Title III itself.

THE COURT: In the two decisions that you cited, those

were both motions to remand cases that had been removed from the local courts invoking the Section 306, Title III related jurisdiction. There was no federal claim asserted in those cases. The right to information was asserted under local law.

Here, you're asserting a constitutional claim, and so why wouldn't we be in 1331 land, since I am an Article III judge and I don't have Stern v. Marshall problems. It doesn't seem to me to quite map onto the cases that you're citing.

MR. MCGILL: You're exactly correct, your Honor. If this court were to hold that it has authority to provide us all of the injunctive relief that we would seek in that alternative in that additional suit, we would be happy to hear that. But our good faith reading of the statute and of your appointment as designated as the judge for this Title III case, we read that not to permit you also to issue an injunction that would prohibit the board for, for instance, carrying out its Title II functions.

I haven't heard the board say that that is incorrect yet. If the board agrees that this court does, in fact, have jurisdiction to provide us such relief, then we would act accordingly.

THE COURT: Has there been an objection to the Title I, Title II related claims in the UTIER and PREPA adversary?

MR. MCGILL: I'm not aware of that.

The key point I wanted to make to your Honor is that

we did not file this to engender duplicative litigation. That is not what we're trying to do. We just want to make sure that we have the opportunity to get all of the injunctive relief to which we would be entitled.

If our other lawsuit ever did go forward, we would anticipate that your ruling on the substantive appointments clause issue would be dispositive of any subsequent lawsuit, and certainly if your ruling were appealed to the First Circuit, the First Circuit's decision certainly would be dispositive of that as well.

That's all I need to say at this time. Thank you, your Honor.

THE COURT: Thank you, Mr. McGill.

We will now turn to the arguments of the defenders of the constitutionality of PROMESA. My intention is to hear Mr. Verrilli and Mr. Ward, and then have a break. Looks like that works for everyone.

Mr. Verrilli.

MR. VERRILLI: Good morning, your Honor. May it please the court.

The board is constitutional. That is so for a very straightforward reason. Board members are territorial officials who serve in the government of the Commonwealth of Puerto Rico. They are not officers of the United States who serve in federal government, and that is dispositive.

Officers of the United States do have to be appointed by the methods set out in the appointments clause, but territorial officers do not have to be appointed that way, so there is no constitutional problem with the method PROMESA established for appointing board members.

What I would like to do, if I could, is walk through what I think are the four key points that substantiate what I just described in summary fashion and that I think lead in a very straightforward way to the conclusion that congress' action here is constitutional.

I think a good place to start, we already have spent a lot of time discussing it, what test does the court apply to decide whether these are territorial officers or officers of the United States.

What I would like to do is first tell your Honor what we think the right test is, then explain why we think the test Mr. Olson has offered you is an incorrect way to think about this.

We think the test is as follows. What the court needs to do to determine whether these are territorial officers or officers of the United States is to examine the structural relationship between the board and the government of the Commonwealth of Puerto Rico on the one hand and the government of the United States on the other and to examine the nature and scope of the authority that the board has to determine whether

it is territorial or federal in nature. We think that if you apply that test, it is quite clear that the answer here is that the board members are territorial officers.

Starting with the structural relationship. Key fact, which we haven't heard any discussion of so far, is that the board is funded 100 percent out of the treasury of Puerto Rico, not out of the United States Treasury. Therefore, the United States Congress, the United States Government, does not have the power that it would have over federal officers. In addition, numerous key laws that would apply. The board of federal officers don't apply. FOIA doesn't apply. The Administrative Procedure Act doesn't apply. The Inspector General Act doesn't apply. The board's employees are not subject to civil service protections. There are many, many more.

When you look at it that way, this is clearly not a federal entity. At the same time, this is not an entity that is within any part of the executive branch of the federal government, it is not in any cabinet department, it is not even an independent agency. In fact, congress said quite expressly in the statute that this board is a part of the government of the Commonwealth of Puerto Rico and is not a federal agency or department.

Then if you turn to the nature and scope of the board's authority, it is clearly delineated as authority that

is territorial in scope. PROMESA's substantive provisions apply only to Puerto Rico and the fiscal crisis in Puerto Rico. The court's authority is limited only to implementing the provisions of PROMESA that is charged with implementing 100 percent entirely territorial. They set no national authority. They set no national policy. They can't do anything outside of the territory of Puerto Rico. We think that that is the right way to look at this. We think that is the way that cases like the @Comidor case tell the court you should look at this question.

Now, if I may, let me turn to why I think the test, as you heard from my friends on the other side, is just wrong. The test they proposed to you derived from Buckley is whether the official is exercising significant authority. But you look at Buckley and you look at the other cases my friends have cited, what you will see is that not a single one of them involved the question of whether it was an exercise of territorial authority versus federal authority. They all involved the question of whether it was an exercise of significant authority versus insignificant authority. The point was on all of those cases, that the authority was significant enough to trigger the requirements of the appointments clause.

That is really vitally important. Their test doesn't get you anywhere near answering the questions you need to

answer in order to determine whether this is a constitutional appointment structure, and that is because, of course, it is absolutely clear, and the Supreme Court has said it from Chief Justice Marshall and Cantor in the early 19th Century, to Justice Kagan in the Sanchez Valle case just two years ago, that when congress is legislating under its Article IV territorial powers, it has extremely broad authority, not only national authority, but the authority of a local legislature, the authority to enact laws in manners that are not constrained by the normal separation of powers, structural requirements that would apply if congress was legislating the structure of the national government. The Supreme Court has said that over and over and over again.

So it is vital to determine which kind of power is being exercised here: Territorial power or the structure of the territorial government or federal power structured to the national government. That is why the test we proposed, I respectfully suggest, gets to the heart of the matter and answers the question in a clear way.

THE COURT: I believe I perceive your opponents as arguing that the act of congress is defined by the Constitution, and so even if congress can establish structures at the territorial level that are not strictly compliant with the constitutional structures for states and the federal government, that congress' ability to act in the methods by

which it acts are not a free-for-all.

So congress always has to color within the lines that the Constitution sets for congress, including appointments clause, presentment bicameralism, that congress couldn't just unilaterally, without a presidential signature, establish a law governing a territory.

Do you agree that the nature of congress and the powers of congress are always cabined by the Constitution, and if so, where do you start drawing lines?

MR. VERRILLI: That is the key question, I agree, your Honor. We certainly agree that congress is cabined by the Constitution. We certainly agree that congress, in enacting laws and the exercises of Article IV power over territories, has to comply with bicameralism and presentment. That is the only way the congress can act with the Constitution.

What those provisions of the Constitution go to is the way in which congress acts as a national legislature exercising its authority under the Constitution. But the question here is, once you have established that congress is acting in a way that the Constitution prescribes is appropriate and congress is legislating under Article IV to establish a territorial government, what constitutional constraints apply.

What the Supreme Court has said over and over again is that the structural separation of powers constraints don't apply to the judgment about what the territorial government

should be structured to operate as. That is what is going on here. That is what is at issue here.

The appointments clause doesn't apply any more than any of the other separation of powers provisions. I mean, if my friend on the other side's theory were correct and the whole territorial judge structure would have been unconstitutional right from the get-go in the 18th Century, because territorial judges were certainly appointed -- nominated by the president and confirmed through the Senate, but only had four-year terms and the didn't get diminution of salaries. So the core separation of powers protections that Article III provides for the federal judiciary weren't there.

THE COURT: I think your opponents respond to that, well, that is an Article I court, so it didn't have to be there and so it is not inconsistent with the general notion that the structural provisions apply.

MR. VERRILLI: Well, but what I think that what it shows you is that you need to figure out which provisions apply and which don't, based on the nature of the power being exercised. They conceded that that is the case, they just want to put the appointments clause on the other side of the line. But it is exactly the same kind of structural separation of powers provision that the Supreme Court has said over and over again doesn't apply.

If you walk through the history -- I do think each

side has thrown a lot of history at you, I realize that -- but a couple of key points here with respect to that. One is that you just can't swear so much of our historical practice with their theory about the appointments clause applying. Even with respect to territorial officers below the level of a territorial governor, it has been the case for hundreds of years that the authority to appoint inferior officers, cabin head, departments in the territories, have been delegated by congress to the territorial governor. That doesn't comply with the appointments clause.

The appointments clause said territorial officers have to be appointed by the president, the courts, and the head of the department. So you can't square that. You can't square territorial judges. You can't square the way congress has historically treated the District of Columbia. That is an Article I power, but it has been understood to be parallel to the Article IV territorial power. You just can't square up of the history. You can't square up their position with the Supreme Court precedent. You can't square it up with the history.

I do want to turn to what I think is the key piece of history, which your Honor discussed a little bit with Mr. Olson, and that is congress' decision in 1947 and thereafter to empower the people of Puerto Rico to elect a governor by popular election as opposed to a federal

appointment. That was in 1947. It was 70 years ago.

Now, it can't be the case that -- it just can't be the case that the position of the governor of Puerto Rico in 1946 was an officer of the United States who had to be nominated by the president and confirmed by the Senate. But that in 1947, that position with exactly the same duties, is no longer an officer of the United States, even though it is exercising the same significant authority, because the congress has decided that the people of Puerto Rico should elect the governor through a popular election.

I think another key point to remember about that is that the great constitutional reforms, the granting of discretion to the people of Puerto Rico to have their own constitution and set up their own form of government delegated by congress doesn't occur until several years after 1947 judgment. So you can't even defend that 1947 judgment on the theory that my friends on the other side have provided to you. And that is why their theory is so deeply threatening to the self-governance that congress has supported to Puerto Rico and other territories.

I do think your Honor had a dialogue with Mr. Orson about Sanchez Valle. If you don't mind, I think there is a key passage here that I do think answers the question that your Honor posed. If you don't mind, I would like to just read if, if I could.

THE COURT: Yes.

MR. VERRILLI: It is towards the end of the Justice Kagan's opinion to the court. The opinion says: We agree that congress has broad latitude to develop invasive approaches to territorial government, as we do here. That congress may thus enable a territory's people to make large-scale choices about their own political institutions and congress did exactly that enacting public law and approving the Puerto Rico Constitution.

But one power congress does not have, just in the nature of things, it has no capacity, no magic wand or airbrush to erase or otherwise rewrite its own foundational role in conferring political authority or otherwise said the delegator cannot make itself any less so no matter how much authority it opts to hand over.

So what the court is saying here, it certainly is answering a question in the double jeopardy context, but if the court is answering it on the basis of a fundamental principle, which is that the congress retains what the court said was the foundational role in conferring federal political authority, that authority is delegated to the people of Puerto Rico through their 1950 Constitution and the governmental structure enacted under it. But it is the authority of the United States Congress at the end of the day. That is the source of the authority.

So when a popularly elected governor, legislature,

members of the government in the Commonwealth of Puerto Rico are exercising their authority, the ultimate source of that authority is the authority of the United States Congress that was conferred on them.

So if their theory is right, then that whole structure has to be unconstitutional because they are all exercising significant federal authority, and none of them were in compliance with the appointments clause. It just can't be right. It cannot be right.

I would like, if I could, to turn to the MWAA case that my friends have put so much weight on. Your Honor asked, I think, exactly the right question about it at the outset of the argument. For one thing, you can read that opinion over and over again, as we all have, I'm sure, in this courtroom. You will not find the phrase appointments clause in there. It wasn't a case about the appointments clause.

But also, I think of particular importance here, what the court said in that case was that it was undeniable that what congress was doing when it set up the structure that it did was exercising federal authority. In fact, the court said congress was acting under the commerce power as well as the property clause, and it said that it did so because it was an undeniable national interest in the flow of air traffic in and out of Washington's national airport. On top of that, it involved two states adjacent to the airport. That was the

reason why the separation of powers restrictions were triggered in that case. The predicate was the court's finding that this was an exercise of federal power.

Now, Mr. Olson said at one point that for purposes of Article IV, territorial power and power over property are interchangeable. Whatever power congress has over property, it has over territories too. But there is no case that says that. There is a very well developed body of authority that I went over in the earlier part of my argument that, under the territories clause, congress has the plenary authority to act as both a state or local legislature as well as a national legislature, and separation of the power constraints don't apply when congress was doing that because they can't. Congress needs that flexibility to engage in that kind of greater statesmanship that Justice Kagan was talking about to ensure effective governance of the territories given the different circumstances they present.

The Supreme Court has never said anything like that about the property clause. So drawing that analogy, I think, it just doesn't work. Then when you get to the last part of the opinion, where the Supreme Court did certainly find a separation of powers problem with the way that board was structured, this case is distinctly different from that. There was a list mechanism there, but there were two key features to it that made the court decide that it was unconstitutional.

The first key feature was that the president had to choose off the list, and the second key feature was that the statute didn't require any additional -- more names than there were available slots. So the statute gave congress the ability essentially to give no discretion, no authority to the president at all.

Of course, now I want to transition, if I could, to my fourth point on this subject, which is the question of whether, once you have concluded that the board members are territorial officers and not officers of the United States and therefore don't have any issue under the appointments clause, is there any residual separation of powers problem at the margin about the way in which the congress provided for the appointment of these board members.

The short and clean and clear answer to that is no. I think it is critical to look at the structure here of the way in which that mechanism works. Now, it is true that before congress leaders provide a list from which the president is asked to choose the board members, but the statute doesn't say, unlike the MWAA statute that says "shall choose," this statute said "should choose." The president isn't obligated to choose off the list. The statute also says that the president has the right to ask for more names if he doesn't like the names on list. And the statute also says that the president has the authority to pick whomever the president wants to nominate,

even if the nominees aren't on the list, and then those people go through the normal by consent procedures.

So the president clearly has very substantial discretion to pick whomever the president wants. The one question arises as a result of this, after 60 days, then the statute imposes limits on the president. Several things about that.

First, Mr. Olson says, well, the Senate was only in eight days over that period of time. That is up to the Senate whether they are in recess or not. There is no constitutional requirement that they not work in July or August. They can decide whether to be in recess or not, and if this is important enough, they can come in and vote. Certainly 60 days is plenty of time. You don't have to have a hearing before you vote to confirm a nominee. You have plenty of federal officers. There is no confirmation hearing, just as you provide to the United States Attorneys. They proceed right to a vote, no hearing. That is something that could easily be accomplished within 60 days.

There is no evidence in the record that President Obama, making those choices, felt any constraint, practical or otherwise, for making the choices. Quite the contrary. Pleasure was consistent. Pleasure with the options available to him.

Really what my friends on the other side are making is

exactly the kind of argument that the Supreme Court rejected in the @Mulcanon cases with respect to recess appointments. It said, let's look at the way the system operates as a formal matter. You don't assess the particular circumstances in a political biplate that's going on in the here and now and decide whether this is allocating power unfairly to one branch or the other. You look at it as a formal matter. You do that here and the answer is clear.

Even if your Honor thinks there is any problem, this really is a fail-safe here, which is that the president felt constrained in the president's ability to make an appointment by the structure. The president could have simply decided to let the 60 days go by and not nominate somebody off the list, nominate somebody else, then it would have been up to the Senate to decide whether to confirm those people.

So the president had that ability to do it, to do it that way, and I would certainly think that given the way the stakes here, if that were the issue, I don't think it is for all the reasons I have given you already, I think that you really don't need to get that far down the line to decide that this is a constitutional structure here, given that we are not talking about officers of the United States. But even if you did, then I would certainly think that principles of constitutional avoidance were justified interpreting the statute to allow the court to operate in that way. I really

don't think you can find a separation of powers problem here.

A few more points. Mr. Olson talked about the commission and the importance of a commission and that commission indicating that you are an officer of the United States. Well, when I worked in the White House counsel's office. I had a really nice commission signed by the president, framed, hanging on the wall behind my desk. I was not an officer of the United States. I was an employee. The fact is that many, many employees in the executive branch are given commissions and many interior officers who don't have to be confirmed by the Senate to take office are given commissions. I really don't think you can read anything of significance into that.

Then a couple more points of Mr. Olson with respect to the Valsia case. We talked about the critical significance of the removal power as showing federal control. Well, of course, that was removable without cause. Its certainly true that the executive branch officer can be removed without cause, does have to make sure that he or she is carrying out their duties in conformity with the wishes of the president. This is a clause standard, a completely different thing.

If I could, I would like to just spend a minute thinking about the way this whole thing is set up because I do think it is something that gets to the heart of it and is really important.

Basically what my friends on the other side are saying is, look, this board is set up as a federal overseer of the common law government. But that is just not right. First of all, the congress said it is part of the Commonwealth government, not a federal overseer. What it is is an independent board embedded within the structure of the Commonwealth government.

Now, the board needed independence because it had to make some very difficult political decisions and choices that the governor wasn't going to like and the legislature wasn't going to like, so they needed independence. But independence is not the same thing as superintendence. I do think, not to be presumptuous, I do think your Honor's opinion, recent opinion about the transformation officer issue really recognizes that that is exactly what the structure is here. Of course, it makes sense that congress would think about it that way, because you now have a very strongly embedded legislative policy, judgment and commitment, to autonomy and self-governance within the territorial structure for the people of the Commonwealth of Puerto Rico. This way of approaching it, this way of doing it is consistent with that commitment. They are embedded in the government of Puerto Rico. They are an independent board.

Now, removal of power does remain with the president, but the reason that it remains with the president is because

you've got to have can some check in case there is malfeasance by board members. Somebody has to have the authority to remove in the case of that situation. You can't really give that to the governor or the legislature of Puerto Rico, for the reasons that we talked about before, independence in the way that could impair the mission.

If they give it to the president, I think that is a very practical reason. But I do think really, their whole argument about control comes down to the fact that the president has four clause rule power. There really isn't any other control. There is no other supervision. The board doesn't report to the secretary of the treasury or anybody else. It is not in the chain of command. They are an independent entity within the government of Puerto Rico.

I think I have exhausted what I want to say, your Honor. I probably exhausted you as well. If you have any other questions.

THE COURT: Thank you. You have been quite clear and comprehensible.

MR. VERRILLI: Thank you.

THE COURT: Now Mr. Ward for the United States. I have you down for 20 minutes.

MR. WARD: Yes. Thank you, your Honor. May it please the court.

My name is Thomas Ward from the U.S. Department of

Justice. I have the privilege of arguing on behalf of the United States. So that I don't bury the lead, it is the view of the United States that PROMESA is unquestionably constitutional despite all the foreign generals in the room today, we don't think that this one is that close.

It is also the view of the United States that if Aurelius and UTIER are correct, that the appointments clause applies here, that not just the Oversight Board, but the entire territorial government of Puerto Rico is unconstitutional. So if Aurelius wins, Puerto Rico has bigger problems than just losing the Oversight Board. There is a good argument that their self-governance and their constitution are also unconstitutional.

Jumping to the appointments clause, as you know, the appointments clause prescribes the method of appointment for all officers of the United States whose appointments are not otherwise provided for in the Constitution. Officers of those persons hold federal offices and exercise significant authority pursuant to the laws of the United States. Central to PROMESA's statutory scheme is a creation of the Oversight Board within Puerto Rico's territorial government. Congress explicitly stated in this PROMESA that the Oversight Board is an entity within the territorial government of Puerto Rico making an expressed designation consistent with the board's authority --

THE COURT: Mr. Ward, I'm sorry. I have to ask you to project more. They are having trouble hearing you in San Juan.

MR. WARD: Sure.

THE COURT: Make that a little more vertical and speak out, please. Thank you.

MR. WARD: Sure. Glad to do so.

THE COURT: Much better.

MR. WARD: The Oversight Board is an Article IV entity to which the appointments clause does not apply. We know the appointments clause doesn't apply to Article IV territorial entries because if it did, as I noted and we will discuss in more detail, Puerto Rico's self-governance statute would be unconstitutional. Aurelius has conceded that territorial self-governance is constitutional, and as a result, their appointments clause argument can't be right.

The territory clause of Article IV is congress has plenary authority over the territories, and as the Supreme Court recently reiterated, pursuant to that plenary authority, congress has broad latitude to develop innovative approaches to territorial governance. That is the Sanchez Valle case that your Honor is familiar with.

The Supreme Court has also held that congress may legislate the territory in a manner that would exceed its powers or at least be very unusual in the context of national legislation enacted under other powers delegated to it under

Article I Section 8. That is the Palmore case from 1973.

To address the crisis in Puerto Rico, congress provided for the creation of the Oversight Board as an entity within Puerto Rico's territorial government to work with the existing territorial government to get Puerto Rico back on sound financial footing. In PROMESA, congress used some of the elements that were successful from the DC control board structure, which was used to get DC's financial house back in order.

The president approved PROMESA and the structure of the Oversight Board by signing it into law on June 30, 2016. By August 31, 2016, two months later, President Obama populated the Oversight Board, choosing from the list, and also appointing his own person. He could have sought to supplement the list with additional names, and he did not have to appoint the people recommended by the congressional leaders. He could have appointed other individuals who would then be subject to Senate confirmation. President Obama chose to go with the names listed in the recommended list. As he stated publicly, he was happy to do so. In fact, he praised the board members as the right people to help Puerto Rico over the challenges it faced.

While PROMESA's Oversight Board may be innovative or unusual in some respects, even though it is close to the DC control board, it was in congress' plenary authority over the

territories to enact that. Beyond that, it was within the president's authority to sign it rather than veto it and populate it without delay.

Turning to Aurelius' arguments, which are also made by UTIER, they say the appointments clause does not apply because, in part -- the appointments clause does apply in part because history is replete with examples where the president has appointed, with Senate confirmation, officials in the territories, such as territorial governors. But as we make clear in our papers, history is also replete with examples of territory officials being appointed by some method other than presidential appointment with Senate confirmation. We also included examples of territorial officials being elected by the people of the territory or the territorial legislature.

What the history actually shows is that congress has long exercised its broad latitude to develop innovative approaches to territorial governor. Again, Sanchez Valle. In our brief, we give several examples of different types of appointments and elections, territorial legislatures, attorneys general and other. Puerto Rico's history alone, there have been elected territorial officials since the @Forager Act. There have been territory officials appointed by the governor under the Jones Act. And Puerto Rico's governor has been elected since 1947.

What the history shows is that congress is allowed to

be innovative with regard to the territories and has not felt itself to be bound by the appointments clause. So Aurelius is, what really disproves the argument here is, I think what Mr. Verrilli touched on, their acknowledgment that the election structure of Puerto Rico's governor is constitutional. Nothing changed between the time when the governor was appointed and the governor was elected in terms of the United States Constitution. That is a real problem for them.

The appointments clause, where it applies, provides the exclusive procedure for selecting federal officers. An election is not one of them. If the appointments clause applies to a territorial officer, an election of that same official would be a violation of the Constitution. Yet territorial officials have long been elected by the people or by territorial legislatures, and territorial legislatures, in turn, have been elected since the founding of the nation. For example, as we note in our brief, throughout the 19th Century, territorial attorney generals and district attorneys were elected by territorial legislatures. More to the point, congress frequently provided for the election of territorial offices that had previously been appointed by the president with the advice and the consent in the Senate. That is happening in Guam, in the Virgin Islands, in American Samoa.

All the arguments made by Aurelius whether the board should be appointed in the appointments clause applied with

equal force to these territorial officers, but they have conceded that self-governance in the territories is constitutional, and that has to be right because the clause does not govern the appointment of territorial officers.

Faced with this reality, Aurelius has tried to invent an election exception to the appointment clause, or as Mr. Olson said, the immediate authority exception to the appointments clause. Those don't exist. The Constitution's text structure history provide no such exceptions, nor does the appointments clause provide an on/off switch for its application, depending on whether the selection is made by territorial residents or federal appointment or whether it is made of immediate authority, as Mr. Olson stated.

Aurelius suggests that this is a constitutional significance, the election point. It is not. This is made up out of whole cloth. Aurelius also suggests that it is of constitutional significance that the Oversight Board owes its existence to a federal law. Again, because of Sanchez Valle, it does not. That is of no constitutional significance in terms of application of the appointment clause. That would be the case with regard to every territorial government or entity within a territorial government. They all go back to the congress. They all owe their existence to federal legislation, even those which are elected. Therefore, what they argue cannot be the law.

Look, they also spend a fair amount of time in their brief on recess appointments, which nobody has touched on today. They tried to argue that the fact that the president has made recess appointments over time, where he appointed and the Senate confirmed officers is evidence that the appointment clause applies. That is quite a leap. The right to make a recess appointment doesn't turn someone into a federal officer or grant them federal powers.

The simple answer is that congress is permitted to legislate in any number of ways in the territories. One way is to give the president the ability to appoint officers with Senate confirmation. If congress does that, the recess appointment power can go with it. That is all it shows.

Looking at the text of the recess appointment power, it is not expressly limited to the appointment of constitutional officers, that is, the text plainly permits the president to recess appoint of a territorial official, if the officer is designated by congress, to require Senate confirmation and the Senate is in recess. That is all it is. There is no magic to the recess appointments. It proves way too much to say that the president's exercise of that power demonstrates a territorial official a federal officer.

Also, Aurelius brings up a number of grab-bag reasons why these are federal officials, and I am going to try to knock them down quick. They say it is significant the Oversight

Board is mentioned in the federal budget. I don't know why they mention that because it doesn't help them. What that shows in the federal budget is that it has zero impact on the federal balance sheet. It receives no federal funding and makes no contribution to the federal coffers. Rather, the federal budget makes clear that the board's financing is derived entirely from the territorial government.

They also argue that the Oversight Board being able to initiate litigation in federal court is of some importance. Again, it is not. The territorial government of Puerto Rico has the same right, but that doesn't make that a federal entity, and nobody would argue otherwise.

They also talked about the ability to get GSA, government facilities. What they don't say is that there is actually a federal statute that allows the provision of government facilities to all the territories on a reimbursable basis. Again, that means nothing.

They talk about federal ethics being applied. That is just good governance. It doesn't turn somebody into a federal officer.

They also talk about being able to serve subpoenas outside of Puerto Rico. Again, that doesn't make it a federal entity. Territorial entities have the authority to issue subpoenas, and the board's subpoena authority is governed by Puerto Rico's statute defining the scope of personal

jurisdiction.

Then, I think, as the people have touched on, the existence of bicameralism and presentment is also, that is the price of admission for congress doing business. That has to be present. So the fact that those two are present doesn't mean that every other structural constitutional protection just gets incorporated automatically. Those are the two minimum ones.

Then they say that the board makes annual reports to the president and congress, so that must mean it is a federal entity. They make an annual report, but they also give to the governor and legislature of Puerto Rico. This is just so people know what they're doing. That would be quite a stretch to say that that was something that turned you into a federal officer.

Going to their separation of powers, which is kind of a subset of their appointments clause argument, any separation of powers analyst here has to account for the context in which congress is exercising its power, which here is the plenary Article IV territory power. The flexible balancing that courts engage in when conducting separation of powers of analysis accounts for that greater authority vis-a-vis the other branches. Congress has plenary authority when it legislates under Article IV that is greater than its authority to act under Article I.

For example, with legislative territories, congress

can cut the president out entirely by providing for a direct election. The balance of power, and thus the separation of powers analysis, is likely different in other context. For example, in enacting a military or foreign religions, the president's power under Article II is at its height and the separation of powers analysis for those instances would reflect that type of balance of power.

Against the backdrop of the plenary Article IV power, PROMESA's selection procedures do not amount to unconstitutional environment because the statute permits the president to ignore the list. The president has the ability under the statute to request supplementation of the list or to appoint his own candidates with Senate confirmation. Moreover, it would be particularly odd to find the separation of powers problem here in light of the fact that the plaintiffs have failed to demonstrate that the president was, in fact, constrained.

In fact, all evidence including the president's public statement goes the other way. He did not ask for supplementation of the list, nor did he select his own appointees and ask the Senate to confirm them.

To the extent that Aurelius is arguing that the statute objectivity provides the president with a number of means to effect his choices, that subjectively the president was, in fact, constrained, that is not the role of the courts

to adjudicate that kind of dispute, because it is impossible to determine whether the statute actually limited the president's selection. Thus, PROMESA's provisions enacted in the context where congress' power is at its apex, governance of the territories do not defend constitutional separation of powers.

Turning to footnote 15, which apparently Aurelius' attorney is very excited. I wish I could get so excited about nothing. We conceded nothing in that footnote. The point in footnote 15 was only to make clear how far Aurelius was overreaching in its deal to strike down the statute.

As we understand their argument, they think the statute must be read to compel the president to pick future board members in the same expedited manner that applied under the special provision for picking initial board members. That is an untenable reading of the statute on its own terms and that should resolve the issue. That was our point in footnote 15. If there is any ambiguity on that point, principles of constitutional avoidance would resolve it going forward. That is all.

I would also like to touch on the remedy point because Aurelius says that the government concedes and agrees that bad things would not happen if the court strikes down the board and the Title III proceeding is dismissed or stayed. That is not the government's proceeding. That is not our position.

If the court concludes that it is going to sever the

Oversight Board and going to stay the proceedings for whatever remedy the court would seek to impose, the government would ask, given the importance of this issue, to have the opportunity to brief what our position would be. But it is not accurate to say that we agree that bad things would not happen.

THE COURT: Just so that I understand you procedurally and logistically, you're asking that if I would determine that this appointment mechanism for the Oversight Board is unconstitutional, you would have me announce that decision, but entertain further briefing on the remedy point?

MR. WARD: Absolutely, given the importance here, and we can do it quickly.

But we think that given the gravity of what is involved here, and that even what a short stay could entail, that we should be able to brief this.

Now, if Puerto Rico, for example, if a stay is not put in place in the Title III proceeding, we don't know what would happen to the Title III proceeding then. For example, Puerto Rico may have payments on its debt due. What we understand currently is Puerto Rico owes $2 billion in debt payments out of a $9 billion budget. That is quite a bite out of what they would have to spend for this year, not to mention what they owed from last year, 2017.

So we would like the opportunity to really sharpen the pencils, put out the numbers, and come up with our

recommendation on the remedy or our position on a remedy.

THE COURT: Pursuing this a bit with you, because eventually there will be rebuttal, and those that are asking for that remedy will have further chance to speak about it.

My understanding of what was said was that they would be asking me to stay any decision that would imply invalidation of what has gone forward. It was unclear to me whether they were asking for a complete standstill of further activity until the Title III, but leaving the Title III and therefore the automatic stay and everything else in place or something else.

What is your understanding of what they are asking?

MR. WARD: That is also my understanding, which is I am not quite sure what they are seeking. But anything that involves the significant delay, even a stay in the Title III proceeding, will have negative consequences for Puerto Rico, and we would like the ability to submit something in writing of our position on that.

THE COURT: Thank you.

MR. WARD: I'll reserve my two seconds.

THE COURT: Fair enough.

At this point, I promised everybody, including myself, a break.

If you don't mind, Mr. Dellinger.

MR. DELLINGER: I'm happy.

THE COURT: We will take a ten-minute break, and then

everyone please return to your seats in ten minutes.

Thank you.

(Recess)

THE COURT: Good afternoon. Please be seated.

Mr. Dellinger.

MR. DELLINGER: Thank you, Judge Swain, and may it please the Court.

Let me address a question that you raised at the outset of the hearing about the relevance of the insular cases to the propositions that we put forward.

We have two propositions under the appointments clause, and neither of them is dependent upon the insular cases. In fact, we have no occasion to disagree with the powerful dissenting statement of the first Justice Harlan in the insular cases that the Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States.

As my colleague, Mr. Olson, suggests, we do not believe that Congress' power under the territories clause is "immune from constitutional scrutiny." We believe that it passes that constitutional scrutiny.

Our two propositions are that properly interpreted, the phrase in the appointments clause, officers of the United States, does not include officials of the District of Columbia, like the mayor and the city council, or territorial officials.

Our second proposition is that the Oversight Board members are territorial officials. And I know both

Mr. Verrilli and Mr. Ward touched on this, but I wanted to add a bit more detail to what I think is a critical point in this case about whether these are or are not territorial officials.

Mr. Olson talks about the significance of the powers, but, as this Court noted in your November 16 opinion, the important responsibilities are shared by the Board and by the government of the Commonwealth.

Those are all territorial powers, and when Congress says -- and you wonder what weight to give to Congress' declaration that this is an entity within the territorial government.

Congress can't declare something to be true by ipse dixit, but when Congress says that and when Congress carries through on that, as it did throughout PROMESA, Congress provided that the Board cannot contract on behalf of the United States. It can't sue on behalf of the United States. It can't draw upon the federal fisc. It can't obligate the full faith in credit, but that's not all. And this is critical. There are federal powers under PROMESA, but where those powers exist, they are not conferred upon the Board.

For example, there is power under PROMESA to waive federal wage and overtime regulations. That's Section 404, but that power is not placed with the Oversight Board. It's placed with the Secretary of Labor and the Controller General of the United States.

Mr. Olson notes that the Board has subpoena powers, but it's precisely delineated as subpoena power under Puerto Rican law, not U.S. law. And to pick out just one of many, 204(d), the Board is expressly given no power over the Commonwealth's implementation of federal programs so that if you go through PROMESA, you see that there is a consistent operating principle that territorial authority only is given to the Board and that, along with the declaration on the part of Congress, is what makes it clear.

Ask this question. If the Board ceased to exist, where would its powers go. None of its powers would go to federal agencies. They would all revert to officials of the Puerto Rican government.

Now, I think Mr. Olson has a very difficult problem with the fact that we have elected since 1947 in Puerto Rico the governor and other officials. We've elected the mayor and city council of the District of Columbia. We have no problem with that under the text of the appointments clause because of the history that suggests that they are not officers of the United States.

He has to create an unnoted, unwritten elections exception, and even that doesn't do the trick because there are other people who are not appointed in accordance with the appointments clause, people who since 1917 and 1947 in Puerto Rico have been appointed by officials of Puerto Rico and

not by the President.

There is nothing in text history or logic that would create this elections exception, and I think to hold that territorial officers are officers of the United States would imperil the democratic government.

It's somewhat ironic that in their brief Aurelius says Puerto Rico should enjoy the benefits of the Constitution's structural safeguards, but if those supposed benefits include a loss of the right of self-governments through elected officials, I think that is a benefit that the Commonwealth could do without.

There is one other way to think about this. If Congress did not violate the appointments clause when it provided for popular election, why is it that all of a sudden Congress becomes under the constraints of the appointments clause if it adds to democratic government an element that the U.S. has, in part with the Federal Reserve Board, which D.C. had with the control Board, an element of insulation partially for some fiscal and budgetary matters from immediate popular election. It makes no sense to say that there is an election exception but that the full weight of the clause applies.

So I think what we have at the end of the day is what Aurelius is seeking is the mere opposite of that broad latitude for innovative approaches of which the Supreme Court spoke just last year.

Because I think there were 62 days in which Congress could have acted, there was plenty of time for the President to have his choices met. Congress was able to pass an entire revision of the Internal Revenue Code through the House and Senate in fewer days than that.

So I think it's not surprising that, given the amount of authority that remains with the President to make these choices, it's not surprising that two successive and somewhat different presidential administrations have not found this to unduly constrain any authority of the President.

If you have no questions, your Honor.

THE COURT: Thank you, Mr. Dellinger.

Mr. Cooper for five minutes.

MR. COOPER: Yes, your Honor. Good morning, Judge Swain. Charles Cooper for the COFINA senior bondholders.

I simply want to punctuate really a point that's made by all of the very fine lawyers who have preceded me on my side of the case, and it deals with this proposition advanced by Aurelius that the way you sort out federal officers from territorial officers is whether they have been appointed federally or whether they've been elected.

Counsel puts it in their brief this way at page 21 of their opening brief: "Officials who are elected by the people of a territory or appointed by such elected representatives are not officers of the federal government. While those installed

by the federal government are federal officers."

This is essentially the fulcrum of their argument. It is an essential pivot. And, your Honor, it seems clearly framed in order to produce two very convenient results for Aurelius. Number one, it renders the Oversight Board unconstitutional, but it saves all of the elected officials -- governors, legislators, etc -- of the Commonwealth from any harm.

So, with surgical precision, Aurelius has, again, produced a result that only applies to the targets of their lawsuit here but leaves standing everybody else in the Commonwealth. That's simply a result that the Constitution cannot sustain.

If you step back for a minute and just assess this argument, it produces results that are, on their face, I would submit, strange and counterintuitive. Congress can give no role, when it acts under its Article 4 powers to make all need for rules, can give no role in the selection of territorial officers to the President of the United States, for if they do, if the President is involved in that appointment process, he essentially has what's analogous to the Midas Touch. He creates only federal officers if he's involved in that process. But Congress can give the entire selection or appointment process to the voters of the Commonwealth.

Your Honor, that just strikes my ear anyway -- and I

would submit it should yours as well -- as a very strange type of constitutional interpretation, one that because it is such an odd result, ought to be driven by constitutional text that leaves very little doubt that that's the result the Constitution requires.

You can search the text of the Constitution and nowhere find anything suggesting in any way that that is the line determining whether an officer is an officer of the United States versus a territorial officer.

Another seemingly odd result of Aurelius' theory here is that it would seem to me that Congress could call for the election of officers that are in every respect clearly and undeniably federal officers, officers of the United States, such as the U.S. Attorney, so long as Congress placed the appointment power in the hands of the voters. That would seem to square with Aurelius' argument.

So, your Honor, I will yield back the balance of my time, but I simply wanted, again, to bring into sharp focus the problem of Aurelius' argument. Thank you.

THE COURT: Thank you, Mr. Cooper.

Now Mr. Gershengorn.

MR. GERSHENGORN: Thank you, your Honor. May it please the Court.

I represent the Retired Employees of Puerto Rico, 160,000 police officers, fire fighters, teachers, judges, and

other government workers who collectively have the largest claim in these proceedings of roughly $5 billion.

I'd like to make three points this morning, your Honor. First is that history makes clear that Congress can generally legislate for the territories free from the appointments clause and similar separation of powers constraints, and all three branches have believed that.

The Supreme Court held, as you heard in Cantor, that Article III doesn't apply to territorial judges. The Supreme Court held in the ^Heisen case that when Congress legislates for the territories, separation of powers arguments don't apply in the same way. And as you heard from Mr. Dellinger and others, courts have held that the appointments clause doesn't apply to the D.C. counsel.

Second, Congress has made the same judgment. You heard about elections. Elections have been part of territorial governments from the start of our republic. I won't belabor that, but I did want to touch on the events following the Louisiana Purchase. Congress provided that all the powers of the existing government "shall be vested in such person and persons as the President of the United States shall direct," no use of the advice and consent.

Congress debated the very appointments clause issue that Mr. Olson is raising here today, and Congress decisively rejected it. In addition, for the next hundred years, Congress

used that exact same language, so not just for Louisiana but for Florida and the Philippines and for Panama.

Not just Congress, the third branch, the executive branch has had the same view for nearly two centuries from Attorney General Grundy's opinion that territorial officers are not officers of the United States in 1839.

Attorney General Cushing made the same point to the Supreme Court in Goodrich in 1854. The solicitor general told the Supreme Court in 2003 that the appointments clause doesn't apply in the territories, and then of course you've heard the United States arguments and seen their briefs today. The history is clear.

That brings me to my second point. Aurelius' efforts to explain away each historical example just don't work. Just to pick the ^Heisen example, for instance, Aurelius dismisses that in a footnote as just a case about statutory ratification. That is simply not the case.

I urge the Court to read pages 384 and 385 of the opinion. The court makes clear its view that Congress can delegate legislative authority to the President when legislating for the territories even though it could not do so constitutionally when legislating for the states.

The same is true for their distinction of the statutes following the Louisiana Purchase. They suggest, for example, that the first governor of Louisiana had been subject to advice

and consent because he was governor of Mississippi. That is true, but that misses the point, which is that no officer was subject to advice and consent but that many others that were appointed by the President did not receive advice and consent.

Even today with respect to the Washington Airports case, your Honor, you asked the question about the appointments clause. It was not at issue. Footnote 23 says, "We express no opinion on whether the appointment process of the board of review contravened the appointment clause." So I hope that gets you what your Honor was asking earlier.

All of that brings me then to my final point which is that Aurelius' effort to provide ad hoc explanations and distinctions for each of these historical examples I think really misses the forest through the trees.

I think what has to happen is the Court should step back and consider the broader import of the territories clause. The framers recognized that they couldn't possibly anticipate the unique local needs and mysteries of all the territories the new nation might acquire.

Some territories were going to be destined for state hood; some not. Some would be geographically close to existing states, some not. Some received emergency or temporary governments; some not. And some, like Puerto Rico, have faced emergency fiscal crisis, at least in part as a result of their territorial status; and some not.

All three branches have realized that the appointments clause gives Congress the freedom to tailor individual solutions to individual territorial needs, apart, freed from, constraints like the appointments clause.

You've heard a number of times today the language from Sanchez Valle, and I'll repeat it as well. The Supreme Court said, Congress has "broad latitude to develop innovative approaches to territorial governance," consistent with the need for what the Supreme Court called "inventive statesmanship for the territories."

The enactment of PROMESA by Congress to meet the emergency conditions in Puerto Rico shows very clearly the wisdom of the framers' approach.

If the Court has no further questions, Aurelius' motion to dismiss should be denied.

THE COURT: Thank you.

MR. GERSHENGORN: Thank you.

THE COURT: Now Mr. Mollen.

MR. MOLLEN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. MOLLEN: Thank you for your patience and hearing us today.

The lawyers who have preceded me have done a fantastic job of going over most of the territory. I'd like to focus the Court on four quick points that I think illuminate in further

detail why this notion that the structural provisions of the Constitution constrained Congress when it legislates for the territories can't be right.

I'd like to start with the ^Heisen case that Mr. Gershengorn just mentioned because I think there is actually an aspect of that case that's even more directly applicable here.

In that case, Congress had delegated a non-delegable responsibility, that is, the duty or the power to lay duties under Article 1, Section 8, clearly unconstitutional if Congress was legislating for the United States, but it wasn't. It was legislating for the territory of the Philippines, and the Supreme Court said that the notion that is fully dispositive here is that when legislating for the territories, Congress can delegate its power of governance to such agencies as it determines appropriate.

In this case, the Oversight Board is the agency that Congress determined was appropriate. We believe that ^Heisen is actually fully dispositive of this question whether the structural provisions of the Constitution apply.

The Supreme Court has also said on a number of occasions that Congress' authority in structuring the governmental affairs of the territories under Article 4 is as extensive as the states' power to order their own affairs or the affairs of the municipalities within the states.

We only have to look around the country, your Honor, and you see many examples where states have adopted structures of government that are incompatible, facially incompatible, with the structural provisions of the Constitution.

We list a number of them in our brief. Just to name one, the attorney general in New Hampshire takes office, not after being confirmed or appointed by the governor and then confirmed by any legislative body, but confirmed by or approved by a five-member, elected board, incompatible with the structures of the Constitution.

If what the Supreme Court said in Cincinnati Soap and in other cases is true, that is, that Congress' authority is equal to the authority of the states in ordering their own affairs, then obviously the structural provisions of the Constitution cannot apply.

Third, we know that those structural provisions don't apply because of history. We've heard an awful lot about territorial judges and the appointment of governors and those sorts of things.

Your Honor, the executive officers of the Virgin Islands today -- there is no legislative consent given. It never goes to a Senate or a House of Representatives for consent to the appointments made by the governor.

Guam has a unicameral legislature, your Honor. If the structural provisions of the Constitution applied when Congress

legislates the form of government for the territories, Guam could not have a unicameral legislature.

Finally, your Honor, the discussion here has avoided, it seems to me, any real examination of the line of demarcation between those rights that do and those rights that do not constrain Congress when it legislates for the territories.

We have 115/116 years worth of history here, your Honor. It does go back to the insular cases, but the Supreme Court reaffirmed that line of cases in 2008. We don't have to rely on ancient case law in order to establish it.

What is that line of demarcation? Congress is constrained only where the legislation it's considering creates personal rights that are essential to free government. That's the standard that has survived for over a century.

It is obvious, your Honor, that the appointments clause, that is, appointment by the President and confirmation by the Senate, is not essential to all free government.

It doesn't exist in the states as I just described, it doesn't exist in some of the other territories, and it doesn't exist with our allies who somehow manage to provide free government to their people without having a president at all, a senate at all, or anything like the sort of structural provisions that we have in our Constitution.

One example -- we have others in our brief -- Great Britain. Your Honor, the members of the prime minister's

cabinet are selected by the prime minister, appointed by the queen or the king, and they have to be, by law, serving both in the house of parliament and in the administration. That is, it's a disqualification for office if -- it seems I've run out of time, your Honor. May I finish this sentence?

THE COURT: Yes.

MR. MOLLEN: It's a disqualification in the British system for the individual appointed by the queen to serve in the minister's cabinet if that individual is not in the house of parliament.

In the united States, it's exactly the reverse, and yet somehow, great Britain manages to provide free government to the subjects of the country.

Thank you, your Honor, for hearing me.

THE COURT: Thank you.

Mr. Blumin.

MR. BLUMIN: Thank you, your Honor. Matt Blumin for the American Federation of State, County, and Municipal Employees, AFSCME. AFSCME Stands today on behalf of the tens of thousands of active and retired Commonwealth public employees it represents.

The average salary of a Commonwealth central government employee is less than $28,000 per year. The average pension is less than $15,000 per year. And these modest resources are being used every day to support entire families

as they recover and rebuild after devastating hurricanes.

AFSCME public servants, like the Commonwealth they serve, cannot afford a single moment of delay in Puerto Rico's recovery. It is for this reason that AFSCME opposes dismissal of these Title III cases.

Nevertheless, AFSCME's members are offended by the current state of Supreme Court jurisprudence with respect to the territories. In particular, AFSCME rejects the racist insular cases and the doctrine of territorial incorporation adopted conclusively by the Supreme Court in 1922 and unfortunately reaffirmed by the courts since.

Under this offensive doctrine, it is only that narrow category of fundamental constitutional provisions which are the basis of all free government that must define U.S. territories deemed unincorporated into the United States.

This doctrine has been deployed by the Supreme Court to deny the constitutional right to trial by jury. It has also been used to justify discrimination against Puerto Rico in federal programs, such as the exclusion of elderly and disabled Puerto Ricans from receiving SSI benefits on Puerto Rican soil.

These basic injustices cut much more deeply at the fundamental nature of free government than rejecting Aurelius' request to formalistically apply the appointments clause to Puerto Rico solely in order to advance Aurelius' interests as an investor/creditor.

To be clear, AFSCME believes that the insular cases and the doctrine of territorial incorporation must be overruled. They are based on racist and false assumptions, were meant to be temporary but have endured for more than a century, and do not reflect the evolution of self-government in Puerto Rico.

But only the Supreme Court can overrule its own decisions. Therefore, unless and until the insular cases are overruled by the Supreme Court with respect to Puerto Rico, AFSCME absolutely opposes Aurelius' effort to derail Puerto Rico's recovery.

Aurelius' impractical demand that, contrary to the Supreme Court's guidance, Aurelius is somehow entitled to have the judicial branch overrule the form of territorial government chosen by Congress simply pales in comparison to the basic rights that everyday Puerto Ricans are denied under the insular cases.

Furthermore, AFSCME agrees with the governor and others that Aurelius' theory, which is that the appointments clause applies to territorial officials, could call into doubt the governor of Puerto Rico's popular election.

The democratic rights to self-governance which Puerto Ricans have fought so hard to win should not be called into question so lightly. For this reason, AFSCME acknowledges that these appointments clause challenges can be resolved under

Supreme Court case law which long predates the insular cases and which supports the conclusion that the Oversight Board members are not officers of the United States within the textural meaning of the appointments clause.

However, for the Court not to reach that conclusion and to rule in favor of Aurelius, it must overrule the insular cases and the doctrine of territorial incorporation entirely.

To merely distinguish those cases and hold for Aurelius would distort the law to benefit off-island investor/creditors while leaving in place a grave injustice to the civil rights of the Puerto Rican people.

If Aurelius were to succeed here in bending the Constitution to its will only to harm Puerto Rico by threatening the Commonwealth's ability to serve its citizens and those citizens' right to elect their own self-government, it would be a tragic act of colonial oppression in the tradition of the insular cases themselves. Thank you.

THE COURT: Thank you.

Mr. Bienstock. I have you down for eight minutes.

MR. BIENENSTOCK: Thank you, your Honor. Good afternoon, Judge Swain. Martin Bienstock from Proskauer Rose for the Financial Oversight Board, both for itself and as representatives.

Your Honor, my mission is to address the motion for stay relief. There are two main points I want to make, and

then I will double back to the jurisdictional issue that was raised in your Honor's colloquy with my adversary here earlier.

First, I want to set the table with some undisputed facts. I say they're undisputed because I'm taking them from Aurelius' pleadings. Aurelius is a plaintiff in a case your Honor has sub judice where it's the ACP complaint.

In paragraph 10, it asserts that it's entitled as a constitutional debt holder, that is, a general obligation debt holder, is entitled to be paid before all other expenses.

In paragraph 11, it complains that the Commonwealth's budget spends some money on recreation and art for the Commonwealth people and children who are growing up. And in paragraphs 6 and 7 of that complaint, Aurelius contends that it has a lien against the property taxes and clawback revenues in the Commonwealth.

Moving over to the request that Aurelius is making here in its motion for stay relief, it leaves us a little bit in mystery as to what it wants to do because it doesn't file a proposed pleading, but it does say in its motion that whatever pleading it files would include two requests for relief, one that all the Board's acts be deemed void and; two, that the Board be enjoined from any further actions under PROMESA. That can be found on pages 2 and 25 of Aurelius' stay relief motion.

So what's the impact of that. The impact, number one, addresses Aurelius' first contention that it should get stay

relief if the stay applies because it is not trying to recover on a claim.

Your Honor, under Section 362(a)(6) of the bankruptcy code incorporated in PROMESA by its Section 301(a), any act to recover on a claim is automatically stayed. It is impossible, given Aurelius' pending complaint where it is asserting its secured and other rights to the Commonwealth's revenues, its request for dismissal of the Title III petition, and for all acts of the Board to be deemed void, which would include its certification of the restructuring cases, the Title III cases. If those go away, the automatic stay goes away.

So it is impossible, given the relief that Aurelius has on file with this Court as requesting and what it wants to file, it is impossible that it is not asking to do an act to recover on a claim.

Even if in Aurelius' personal mind process it is thinking that maybe it wouldn't take immediate action to recover on a claim, what it is doing is an act to recover on a claim.

And more importantly, your Honor, if the relief it's requesting were to be granted such as all its acts deemed void, including its restructuring certifications, then even if Aurelius were kind enough out of the goodness of its heart not to go forward to seize assets, to engage in the race to the courthouse, all the other thousands of creditors in the

Commonwealth would be free to do so. And it's really hard to believe that Aurelius would stand by and let everyone else try to get paid while it was silent.

So, whether or not it personally wants to go forward and grab assets, it's asking for relief, the essence of which is to enable itself and all other creditors to recover on claims.

So the notion that the stay doesn't apply is just wrong because it applies to any act to recover on a claim, and this is not, as Aurelius argues in its reply, an overbroad reading of the word "any act to recover" in 362(a)(6).

One can't imagine an any more direct connection between the relief it's asking for, its position in the case, and recovering on a claim. Anyone wanting to recover on the claims Aurelius owns would want to get rid of the automatic stay, which is exactly what it's asking to do.

So, number two, it says, if the stay applies, which we contend it does, it should clearly be granted relief. And why? Because it contends that it's being hurt. And how is it being hurt? It says on page 24 of its brief, it says the harm it's suffering arises from the Board's unlawful certifications of the fiscal plan, the budget, and the restructuring.

Your Honor, it is truly ironic that a litigant who comes to this Court today to enforce constitutional rights in this motion believes it can make three conclusory legal

allegations that it's being harmed by unlawful certifications, without showing any subject matter jurisdiction to the Court to do that in view of Section 106(e) without putting in an iota of evidence, and assuming the Court can simply take its legal conclusory obligation as proof in evidence that it's being harmed, and therefore, should get stay relief. The bottom line is it has failed to state a claim.

Finally on the jurisdictional issue, your Honor, the relief Aurelius requests in its motion to dismiss the Title III petition that the Court has heard this morning, in paragraph 5 on its proposed order, it wants the Court to say that the Board was unconstitutionally appointed. Its acts were void ab initio.

In paragraph 6, it acts for a dismissal of the Title III petition. That is identical to what it wants permission to file with another district court or a court in the same district but perhaps with a different judge assigned, or perhaps your Honor would be assigned. It's unclear.

The bottom line, it's asking for the same relief twice. Now, it will probably come back and say, well, it has some question as to whether the acts it wants to declare void could go beyond its Title III acts and affect Title II.

Well, your Honor, under Section 306 of PROMESA, it's the same construct for your Honor's subject matter jurisdiction as in Title 11, namely, anything arising under PROMESA arising

in the case or related to -- related to affects the administration of the case -- and anything that adds or subtracts to the assets and liabilities.

So, while we can't say because it hasn't filed a complaint that all of the relief it's asking for it's not already asking for, clearly some of it is, but it's left that to a mystery because it didn't give us a draft complaint.

Unless your Honor has questions.

THE COURT: I do.

Given your position as to the applicability of the stay to the broader conceptual purpose of this litigation, which is also mirrored in substantial part in the UTIER complaint, is there a principled reason why there was no objection to what has been initiated as violative of the automatic stay or needing some relief in advance that I should consider in connection with this motion?

MR. BIENENSTOCK: Your Honor, it's a matter of I think history and custom that people can always come to the restructuring court and ask for relief that if they would go into any other court for they would need stay relief.

To be sure, because your Honor is perfectly positioned to take into account how to grant any remedy without obstructing things that the Court and the law wouldn't want obstructed, I would point out in that regard that Aurelius' proposed order in the motion to dismiss does not include a stay

pending appeal.

THE COURT: Thank you.

Mr. Harris.

MR. HARRIS: Thank you, your Honor. May it please the Court. Mark Harris for the Oversight Board.

I'm here to address the Board's motion to dismiss UTIER's adversary proceeding. I'm planning only to address the standing issues as the appointments clause issues have been dealt with already by others.

So I have two quick points to make, your Honor, concerning standing. One concerns constitutional standing; the other one concerns prudential standing. On constitutional standing, UTIER has not shown that it complies with the requirements of Article III.

As the Court is aware, Article III requires three showings for constitutional standing -- injury in fact, traceability, and redressability. That's the basic requirement for every lawsuit that's brought under Article III.

UTIER needs to be able to show that it suffered injuries in fact, and it needs to be able to put those injuries at the doorstep of the Board in order to proceed with its filing.

The trouble here is that it's quite clear from UTIER's filing that its complaint is really with the Commonwealth, not with anything that the Board has done. When it describes its

injuries, it describes some number of impairments concerning its collective bargaining agreement and says that it suffered various harms.

It doesn't cite the provisions of the CBA itself. The real problem is that each of the impairments it's complaining about was caused allegedly by something that the Commonwealth did, not the Board at all.

It refers to four statutes. Three of these statutes were passed by the Commonwealth before any fiscal plan was certified by the Board. In fact, one of them was passed in 2014. So that's years ago.

The last one, which is the Fiscal Plan Compliance Act -- that was passed after the Board approved, certified, a fiscal plan. But, again, it's the Commonwealth's action, not the Board's action, that it's complaining about.

Now, I think that UTIER explains somehow that it believes that the acts incorporated something that the Board did, but that's not what happened at all. The Commonwealth passed its own laws, and if it has complaints about those laws or thinks that those laws somehow harmed it, its claims are against the Commonwealth, not against the Board at all.

This is a problem, as I said, your Honor, that goes both to traceability, that the injury that it alleges it can't blame the Board for. It also relates to redressability because the key takeaway from all this is that even if UTIER received

the relief it's asking for, which was the invalidation of the Board, these four statutes would still be on the books. It wouldn't affect anything. It wouldn't change the impairments. That's the reason why they don't have Article III standing.

I want to very briefly address prudential standing. This is a problem for their third and fourth prayers for relief. In those prayers for relief, UTIER has asked for declarations or orders declaring that all of the Board's actions up until this point are null and void and also an injunction, that any actions that the Board takes in the future will be either preventing them or declaring those to be null and void.

Our position is that those are both nullified and blocked by Section 106(e) which basically says that there is no jurisdiction in this Court to review challenges to the Oversight Board, certification determinations. That's really what those prayers for relief were getting at.

Again, going back to the injuries that they're claiming, the injuries, as they've alleged them, they believe all go back to the certification of the fiscal plans. Again, as I've explained, really the harm is caused by statutes. It's not caused by the fiscal plans.

Even on their theory which is that somehow the fiscal plans influence somehow the passage of acts, that was blocked by 106(e). They can't go forward with a challenge to certify

fiscal plans. 106(e) says there is no jurisdiction for those to be considered. For that reason, UTIER is not able to bring those claims.

If the Court has no questions.

THE COURT: Thank you.

MR. HARRIS: Thank you.

THE COURT: Now we will turn to the rebuttal arguments, beginning with Mr. McGill.

MR. McGILL: Thank you, your Honor.

I want to start just by being very clear about what Aurelius is seeking here today because there seems to be a little bit of confusion about that. So, of course, we are seeking dismissal of the Title III proceeding. That is the relief sought by our motion to dismiss. We have further said that we would consent to a stay pending appeal of that if this Court were inclined to enter an order dismissing the Title III petition.

As Mr. Bienstock said, we did not include that in our proposed order, but I think we've made clear -- and I'm making clear right now -- that we would not object to a stay pending appeal if one were sought by the Oversight Board or others.

We also filed this motion seeking relief from the stay because it was, in our view, not clear whether this Court had jurisdiction as the Court overseeing the Title III proceeding to issue the full measure of injunctive and declaratory relief

that we sought.

I did not hear counsel for the Board state a position on that. So, for that reason, I think we would continue to say that we should get relief from the stay. We think the stay does not apply because the contemplated lawsuit is one for declaratory and injunctive relief against the Board, not the debtor.

It rides solely on this appointments clause issue. This is not, in any sense, an action to enforce one of Aurelius' claims against the Commonwealth. So, for that reason, we think the stay does not apply.

I do want to be clear. We have no interest in duplicative litigation. If we filed such a lawsuit and it were assigned to your Honor, we would have no objection to that. As I said before, we expect your ruling here to be dispositive of any lawsuit that we filed seeking additional injunctive relief.

Certainly if this case goes to the Court of Appeals -- and you suggested that it might -- that appellate ruling certainly would be dispositive of not only the motion to dismiss filed by Aurelius here today but also any other lawsuit seeking additional injunctive relief.

We also think that there is good cause to grant us relief from the stay, even if the stay applied, because if we're correct that the appointments clause here has been violated and Aurelius is suffering a constitutional harm by

virtue of the fact that it is being made part of a bankruptcy proceeding that was initiated by and is being administered by persons who do not have authority under federal law to hold the offices that they are holding. We think that's clear constitutional harm. It counts as irreparable, and that would be adequate grounds for relief from the stay.

So we do think that the motion for relief from the stay should be granted or that the stay should be clarified to make clear that it does not apply to an action seeking relief against the Board for an appointments clause challenge, but another way that the Court could handle this is if the Court is going to grant our motion to dismiss, I would expect that would be appealed expeditiously by the Board.

If the Court is going to deny our motion to dismiss, we would ask that the Court then enter an order under Section 1292(b) that would certify it for interlocutory appeal. We think that there are plenty of good arguments that we could appeal it as of right, that that would resolve any issue of appellate jurisdiction in the First Circuit.

That way, as we stated and as Mr. Olson stated at the outset of his argument, our interest is getting an expeditious resolution of this issue so that this proceeding can move forward. That is what our client wants, and that is what we're here trying to achieve. Thank you, your Honor.

THE COURT: Thank you.

Mr. Emmanuellei.

MR. EMMANUELLEI: Thank you, your Honor.

The opposing parties have raised some fear about the legality of the internally elected territorial officers.

The government and the other opposing parties assert that recognizing the constitutional flaws in PROMESA's appointments mechanisms would necessarily entail that the internal elected governments are unconstitutional. That is incorrect, your Honor.

Federal officers can coexist with territorial officers. As recently as 2016 in Sanchez Valle, the Supreme Court distinguished officers who report to the federal government from those who reflect the idea of self-government stating that -- this is Sanchez Valle -- while the federal government remains the ultimate source of all sovereignty in Puerto Rico, local democracy makes the Commonwealth sovereign in the ordinary sense that the island has a measure of autonomy comparable to that process by the states, and the most immediate source of Puerto Rico's authority to act and enforce law is the Puerto Rico populace.

UTIER is not contending that the democratic election of territorial officers violates the appointments clause. On the contrary. When authority is derived directly from the consent of the governor as opposed to remedially from Congress, the character of the office is fundamentally changed.

That authority is ultimately delegated by the people of the state, and the local electorate of state officers who appoint them are accountable for their actions.

On the issue of the laws that affected UTIER, I should say that those laws substantially affected the entitlement and fiduciary duties of UTIER to negotiate and defend the collective bargaining agreement that protects its members.

These laws were adopted by the members of the Board in the Commonwealth fiscal plan and in PREPA's fiscal plan and budget while being improperly appointed as members of the Oversight Board.

The Board claims that neither the fiscal plan nor the budgets discharges any claim and that no motion to that effect has been filed, but it's also said that the fiscal plan is an operative blueprint for financial management and the plan of adjustment of debt.

The filing of a plan of adjustment of debt is the sole purpose of this Title III proceeding. Eventually, the Board will file the plan of adjustment and will further impair UTIER's rights, which at the very least, represent an imminent injury and a monetary loss for its members. That is standing for UTIER. Thank you, your Honor.

THE COURT: Thank you.

Mr. Olson.

MR. OLSON: Thank you, your Honor, for your attention

and for your patience. You heard a lot of different voices today, and I will take this opportunity, as briefly as I can, to respond to some of the arguments made by our opponents with respect to this motion.

The fundamental question before you is whether or not members of this Oversight Board are officers of the United States. And if they are officers of the United States, were they appointed under the statute in a manner consistent with the Constitution of the United States with respect to the appointment of officers of the United States.

Starting with Mr. Verrilli, our opponents have challenged our assertion with respect to what the test is that you must apply to determine whether these individuals, these appointees, are officers of the United States. And we've heard various different iterations of alternative tests, but they are clearly stated in many Supreme Court decisions.

I will quote the Freytag case, "Any appointee exercising significant authority pursuant to the laws of the United States is an officer of the United States and must, therefore, be appointed in the manner prescribed by Section 2, Clause 2, of Article 2." That's the Freytag case.

In the Metropolitan Washington Airports case, the court said, "An entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect and acknowledge federal interest, and

membership of which is limited to officials are officers of the United States." The court has stated that several times.

It isn't how big an area the official has dominion over. There is no limitation if the official of the United States is a clerk of a tax court or a clerk of a territorial court or a trustee that is given limited jurisdiction over space or a marshal of the United States that has a limited territorial jurisdiction. It's whether that authority is exercising significant authority, that official is exercising significant authority under the statutes of the United States.

Now, what happened here. What was intended. What was intended was to create a federal board of federal officials to oversee what was happening with the financial affairs of Puerto Rico.

Congress wasn't interested in vesting authority in Puerto Rican officials to act pursuant to Puerto Rican law to deal with the financial problems in Puerto Rico. They were creating a federal board because that other solution had not been working out.

There were serious financial problems. Congress decided it must intervene, and it must create an agency that would protect millions of citizens in Puerto Rico and the millions of citizens who are affected by the financial affairs of Puerto Rico, millions of citizens who are outside the

territory of Puerto Rico to whom money was owed or financial obligations are owed.

So it was intended to be a federal board of federal officials to deal with what was perceived as a major federal problem affecting millions of United States citizens.

THE COURT: So then why did Congress say specifically that it was being created as a territorial Board?

MR. OLSON: I think because Congress was concerned about the very appointment clause provisions. They did the same thing with respect to the Metropolitan Washington Airports Authority by saying these congressional members were going to be acting in their individual capacity.

And what the Supreme Court said is that a label given by Congress is not dispositive. What the Supreme Court or the courts must do with respect to facing these questions is look at what's really happening.

There is no question what Congress intended with respect to the Board. It was created by a federal statute. That's federal authority under a federal statute. Its only function is to enforce a federal statute. Its members were appointed by a federal official.

I've said these things before. So I beg your indulgence with respect to that, but all of these manifestations are simply manifestations indeed of the fact that it is a federal job that was being done with federal

parameters, federal authorities created in order to exercise that federal responsibility.

With respect to the appointment -- I read this before -- but Congress was fairly forthright about it. "The section for the appointment of several of the individuals through a process that ensures a majority of its members are effectively chosen by republican congressional leaders."

(Continued on next page)

MR. OLSON: Congress was forthright in terms of the problem it was trying to solve and it was forthright with respect to the mechanism by which it would put officials there to solve that problem.

One of my colleagues here today said, well, what would happen if the board were to disappear? All that authority would be exercised by Puerto Rican officials. Well, that is not true, because congress created this agency because it was not satisfied with what was happening by Puerto Rican officials with respect to the finances of Puerto Rico. So congress would have to move further to create another board, if for some reason this board disappeared. And there is no reason this board would need to disappear and there is no reason really to go back to congress. Because if the unconstitutional provisions are stricken by you or by a higher court with respect to the difficult constitutional problems that exist, the board may go forward and exercise its authority in a constitutional way.

Now, with respect --

THE COURT: Given your view of the effect of elections on the source of power, if congress had in this statute provided for popular election of the members of the Oversight Board from a slate prepared by congress, would there still be an appointments clause problem?

MR. OLSON: Yes, there would because it would be a

federal statute creating federal authorities. All these authorities that are being exercised at the board are pursuant to a federal statute. So if it is a substantial federal authority created by a federal statute, then the appointment clause must be complied with, and you can't give that authority away.

With respect to the territorial limitations, I'll refer again to the U.S. Marshals, U.S. Trustee's commission, such as the Presidio Commission out in California which is taking care of the former Army base in San Francisco, and the Metropolitan Air Force Authority of the Tennessee Valley Authority. Congress constantly is creating agencies, officials, and so forth, with limited territorial scope, with limited territorial responsibility.

If a clerk of a territorial court is an officer of the United States, which the Supreme Court has said, then certainly these individuals who exercise such substantial power are officers of the United States.

THE COURT: What changed about the governor of Puerto Rico between 1947 and 1947?

MR. OLSON: That's a very good question, because we hear that repeatedly from our opponents. Actually, that kind of authority delegating to the authoritarian territory itself wants power to enact laws or a constitution for self-governance is permissible and it has been since the foundation of the

country.

Because the very first statute that congress was dealing with, one of the very first statutes that congress was dealing with, was the Northwest Territory enactment. And in that respect, when the Articles of Confederation set up an appointment power that was vested differently when the Constitution was adopted, congress really realized that it had to change that and amended the Northwest Territory statute or the treaty with respect to change the appointment power, but still, legislative officials in the territory were local officials.

On and off during history, congress has decided that we will best authority in a territory to elect its own local regional municipal type of government. And then the substantial difference the court has made clear is that then when those officials are acting, they are acting pursuant to the authority that is given to them by their own officials in their own territory.

But when this board is acting, it is not acting pursuant to any law of Puerto Rico or the Constitution of Puerto Rico, it is acting pursuant to and restricted by the federal statute itself. So the source of the authority is what the Supreme Court has repeatedly talked about. That is what the language that I quoted to you with respect to the various cases. It is whether substantial federal authority is being

executed.

There isn't any question. No action by this board is constrained or dictated by Puerto Rican law or Puerto Rican officials or Puerto Rican citizens. They owe their responsibility to the president and who can remove them and their appointment by the president if it is done in a constitutional way.

The Buckley case --

THE COURT: Do you have any specific case law recognizing direct election as something that moots or obviates, specifically recognizing direct election as some popular election or something that moots or obviates the seemingly absolute language of the appointments clause?

MR. OLSON: I don't have a specific authority that says that, but what we do have is the authority that says the source of the power pursuant to which the official acts is the determinative factor as to whether that officer is an officer of the United States or an officer of a local agency.

Congress has -- history is the guide to this -- the Supreme Court talked in the Noel Canning case about how important history is with respect to the interpretation of the recess clause. We cite that in our briefs. The fact is that congress has been doing this from the beginning of time with respect to vesting certain authority in territories or other places to local officials, and that is not a violation of the

appointments clause because the authority then to which the individual has to respond is the local authority rather than the statutory authority.

The Buckley case is another case with respect to what the source of the authority is. Congress there and the arguments there in support of the Federal Election Commission appointments was said to be acting pursuant to its authority in the Constitution explicitly in Article I to control the manner and time and so forth of elections.

The Supreme Court says, yes, the authority of congress is plenary with respect to the elections clause, but that doesn't immunize congress from complying with the structural constraints of the Constitution.

We have heard much about territorial courts and how that somehow is a response to the arguments that we have been making. But those cases allowing territorial courts talk in terms of Article I courts, territorial courts, tax courts, military courts, and other authorities. The courts have repeatedly said that all judicial power need not be vested in Article III bodies. A member of the judiciary can be appointed with respect to the authority to create inferior courts, specifically set forth in Article III and also in Article I, and those cases involve various different Article I type courts. That does not change anything.

In fact, those Article I courts are also officers of

the United States because they are exercising substantial authority under the statutes of the United States and, indeed, their clerks are officers of the United States, according to the Supreme Court.

THE COURT: Now, if congress passed a statute requiring the president to compile a list of candidates for a governor of Puerto Rico and submit that list to popular election as opposed to a selection to Senate advice and consent, would that be constitutional?

MR. OLSON: I think your question was that if the president compiles a list, which is then submitted to Puerto Rico officials, you can elect your governor?

THE COURT: Then submit it to the Puerto Rican people, that is what goes on the ballot?

MR. OLSON: You can elect your governor, but the governor that you elect must be from this list.

THE COURT: Yes.

MR. OLSON: I think that would be a more difficult question, but to the extent that congress is then taking the responsibility under a federal statute to limit the persons who will be the head of the executive branch in Puerto Rico, it would raise substantial questions under the appointments clause because the president -- neither the president nor congress can give this authority away.

We cited the Boumediene case involving Guantanamo

detainees and so forth. The Supreme Court said congress may have full authority in the territories of the United States, but it cannot contract away fundamental structural provisions of the Constitution. One of the things that we heard today was that there was somehow a difference between a territory and property under Article IV.

THE COURT: Before you go there, would the governor in this scenario be a territorial officer or a federal officer?

MR. OLSON: He would be an officer of the United States if his authority is derived from federal statute. The hypothetical that you're giving me doesn't completely cover what kind of laws are being enforced, what limitations on the power, how the individual must act. But to the extent that the authority being exercised is created by a federal statute in a hypothetical you give, then that person would be an officer of the United States.

THE COURT: In 1946, you have a governor who is appointed by the federal government with the set of powers that presumably congress has structured.

1947, that person prior to the adoption of a constitution is popularly elected, and I think you tell me there is no appointments clause problem there, no obvious change in substance of authority, perhaps source of authority.

So let's say in 1946 and a half, the president provides this list and it wasn't an open. Anybody in Puerto

Rico wants to nominate, but it was an election.

Does the character of the governor change from a U.S. office to a territorial office, and at what point and why?

MR. OLSON: I think it is difficult to parse exact lines with respect to this, but what the court is basically saying is if congress passes a statute which delineates the authority pursuant to which the appointee is acting, then that person must be appointed in a manner consistent with the Article II appointment clause provisions.

THE COURT: So there is a question about whether the change to popular elections in 1947 was actually compliant with the Constitution, where there was no separate Puerto Rican Constitution at that point?

MR. OLSON: No. I think because the municipal laws that were governing the activity of the governor at that particular point in time -- and I haven't studied this, so I'm not sure of what I am saying here with respect to that -- but to the extent that the decision-making, the scope of authority, the relationship between the official and the legislative branch is determined by some municipal instrument or a territorial instrument that delineates those authorities, then that official, over history, has permitted on the Constitution permits that authority to be exercised by someone who hasn't gone through the advice of consent provisions.

THE COURT: But if the key points were in the Jones

Act or carried over from the Four Acre Act and hadn't yet been instantiated in the Constitution for Puerto Rico, then it might be a problem?

MR. OLSON: It might be a problem to the extent that the authority being exercised is pursuant to that federal statute, whichever statute it might be. There might be differences at various different times, but it is clear that what has happened over time is that under certain circumstances, congress, pursuant to its authority under Article IV, can define the rules and regulations. And when it continues to exercise authority over those areas, then those are federal officials. But it may delegate that authority to local officials under certain circumstances, which it has done from the beginning of our constitution.

The idea that the board cannot -- the central fact is with respect to this case -- there might be closer cases, there might be different types of cases -- but with respect to this case, it is clear that congress was intending to create a federal Oversight Board. It may have called it a territorial board. But the effect of it, what the court did, what the congress did was create a federal Oversight Board. It decided when and under what circumstances actions by the governor or the legislature of Puerto Rico bonds other provisions would have to be run through and secure the consent or non-objection of the Oversight Board.

And those individuals, when they need to look at whether they can act on something, whether they can exercise some authority or not, where do they look? They do not look to the Constitution of Puerto Rico. They look to the responsibilities given to them by the federal statute.

Now, we have heard a little bit about how this is a very ingenious creative method, and Article IV allows congress a lot of flexibility to create innovative solutions to problems. But those are the same arguments that were made in the Chadha case. The same arguments that were made in the Northern Pipeline case, and in other cases where the Supreme Court of the United States looked upon its responsibilities and said, well -- especially in the Chadha case. In the Chadha case, the legislative veto cases, congress was looking -- I mean, the court was looking at overturning some 200 statutes that had been passed by congress, signed by the president from the Roosevelt administration all the way up through the Carter administration. And the Supreme Court said, it is fine to have these innovative creative approaches by congress, but they all must comply with the structural limits of the Constitution of the United States.

These provisions about the appointments clause and other structural separation of powers provisions are designed to protect all citizens of the United States. I heard one of my opponents say, well, the citizens of Puerto Rico will be

just fine without your federal interference with the appointment of our authorities. But the point is that for the long term and for the liberty of our citizens throughout our nation, those structural provisions protect the liberty and protect the structure of government and provide for accountability so people will know who is responsible for making the decisions. These lists were actually secret lists that were sent to the president. There wasn't any publication of who sent what names to the president. So this accountability is dissipated when people are appointed in that particular fashion.

THE COURT: But the president had to own the names that were chosen and that was published, so that is no secret. The president said, These are the people I am choosing, and he did it at least two weeks before the deadline.

MR. OLSON: Right, he did. Because his pressure, if he didn't act that way and he didn't have time to have the advice of the consent of the Senate, I think it was Mr. Verrilli who said it was the Senate decided, the Senate could decide whether to confirm through an advice of consent process or not.

Had the Senate, if it had had time for the president to submit names to the Senate that the president came up with as opposed to names that came up from legislative leaders, if the president had had time to do that, which he didn't, there

is no opportunity to go through that process. Had he had time, the Senate could have said, well, we are busy or we're not in session or we are having pro forma sessions and not going to come back into full session to conduct an advice and consent process. If the Senate hadn't done that by that deadline, this is the power created by the statute. It isn't what actually happened. It is the power created by the statute.

The ultimate control was in the branches of the congress to decide who could be appointed. If that hadn't been done, the statute specifically provides that the names have to come from the congressional list.

I also heard one of our opponents saying, well, the president can't ignore that and wait and just submit names and maybe they will be approved by congress. But the statute said says that the president cannot do that, that the president, after that deadline, must appoint officials from the lists.

This is a very, very important structural provision that is intended to protect all citizens of the United States. And at the end of the Metropolitan Washington Airport Authority case, the Supreme Court has a paragraph where it says, if congress can do this, there is no limit to what congress can do in terms of constraining the appointment process and creating all manner of ingenious techniques to rest power from the president of the United States.

So the Supreme Court is very much aware, if you break

the line and allow these kind of changes to take place, congress will continue to pursue them. It is clear in the federalist papers that that impetuous vortex, which is what Hamilton referred to, is something -- was attempting to move greater power to itself and reduce power from the president or the other branches of government, and that is what must be guarded against, and that is the authority given to the judiciary beginning with Marbury v. Madison.

THE COURT: Thank you, Mr. Olson.

This has indeed been not only a long day, but an extraordinary and extraordinarily important day. I thank all of the advocates here for their thoughtful, detailed arguments and for engaging my various questions and hypotheticals.

I take these matters under advisement, and you'll know when I have reached a decision from the ECF system.

We have scheduled another argument to begin at two. We will begin that at 2:10.

Thank you, all.

(Adjourned)

UNITED STATES DISTRICT COURT)
) ss.
OF PUERTO RICO)

REPORTERS' CERTIFICATE

I, Kelly Surina and Lisa Picciano Fellis, do hereby certify that the above and foregoing, consisting of the preceding 117 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of our ability.

Dated this 10th day of January, 2018.

S/Kelly Surina_____

Kelly Surina, RMR, CSR, RPR, CRR

S/Lisa Picciano Fellis_____

Lisa Picciano Fellis, RMR, CSR, RPR

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